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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~351.~~ 121

EDWARD T. WORTHINGTON AND ISAAC M. WORTHINGTON, AS ADMINISTRATORS OF ELISHA WORTHINGTON, DECEASED, PLAINTIFFS IN ERROR,

vs.

MARTHA W. MASON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED MARCH 31, 1877.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Martha W. Mason, plaintiff, and Edward T. Worthington and Isaac M. Worthington, as administrators of the estate of Elisha Worthington, deceased, defendants, a manifest error hath happened, to the great damage of the said defendants, as is said, and as appears by their complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of *of* the United States, together with this writ, so that you have the same at Washington, on the Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fourteenth day of July, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the hundred & first.

[SEAL.] RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—

HENRY C. CALDWELL,
District Judge.

2 We acknowledge service of the within.

DODGE & JOHNSON,
Of Counsel for Pl'ff.

Filed July 14, 1877.

RALPH L. GOODRICH,
Clerk.

The execution of the foregoing writ of error appears by the schedule hereto attached.

RALPH L. GOODRICH,
Clerk.

3 Be it remembered that on the 19th day of March, 1875, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas, Martha W. Mason, by William H. Sutton, and Dodge and Johnson, esqs., her attorneys, and filed therein her complaint against Edward T. Worthington and Isaac M. Worthington, as administrators of Elisha Worthington, deceased, which complaint is in the words and figures following, to wit:

The plaintiff, Martha W. Mason, states that she is a resident and citizen of the city of Pittsburgh, in the State of Pennsylvania, and that she brings this her complaint against Edward T. Worthington and Isaac M. Worthington, as administrators of the estate of Elisha Worthington,

deceased, who are both citizens of the county of Chicot, in the State of Arkansas, and in the eastern district of Arkansas, and prays that they may be made defendants herein.

And for cause of action plaintiff says:

First. That the defendants, Edward T. Worthington and Isaac M. Worthington, as administrators of the estate of Elisha Worthington, deceased, are indebted to plaintiff in the sum of one hundred thousand dollars (100,000), for services rendered and for the work and labor of plaintiff by her before the death of defendant's intestate, Elisha Worthington, done and performed in and about the business and household affairs of the said intestate, Elisha Worthington, at his, the said Elisha Worthington's special instance and request and being so indebted the said intestate, Elisha Worthington, in consideration thereof; had at said time and at various and other times undertaken and promised plaintiff to pay her the said sum of money at his death. That said services rendered and work and labor done and performed extends continuously from the fall, to wit, the 5th day of December, 1860, to the 19th day of November,
4 1873, when the said Elisha Worthington departed this life, and the said sum and consideration for said services only became due and payable upon the death of the said Elisha Worthington. Plaintiff states that no part or portion of said indebtedness has been paid or in any manner satisfied, although the defendants as such administrators have been requested so to do, so that the same remains wholly due and unpaid, all of which will more fully appear by reference to plaintiff's bill of particulars herewith filed, marked Exhibit A, and made a part of this complaint.

Second. That, as by law required, plaintiff presented her said claim of one hundred thousand dollars as aforesaid to the defendants, as such administrators as aforesaid, made out in due form of law, properly sworn to and duly presented within the time required by law, to wit, on the 3rd day of December, 1874, the same being within one year from the date of granting letters of administration on the estate of said Worthington, deceased; that said claim upon being so presented was duly considered by said defendants as administrators, and by them was refused and rejected this, to wit, on the 3rd day of December, 1874. All of which will more fully appear by reference to the original of said claim and account with the affidavit thereto made, and the endorsements made thereupon, marked Exhibit B, and made a part hereof.

Third. And for a further cause of action herein, plaintiff states that she is the natural daughter of the defendant's intestate, Elisha Worthington, so acknowledged, considered and treated by him during the entire period of her service as aforesaid, and that she was born on the day of , 18 ; that as such natural daughter, on the 5th day of December, 1860, she entered into the service of the said Elisha Worthington, taking charge as his confidential agent of his estate, which
5 at that time was worth over a half million of dollars, the same being situated in the county of Chicot, in the State of Arkansas, and consisting of certain plantations known as "Sunny Side," "Red Leaf," "Eminence," and "So So," plantations at that time places of magnitude and great value; that said places were situated upon or near the Mississippi River, and were exposed to great danger and devastation by reason of the war then commencing between the North and South; that as such confidential agent and servant, at the request and by the employment of the said intestate, plaintiff remained upon said "Sunny Side" plantation, taking care of and protecting the same from destruction and plunder, and did so remain in sole charge of said property

until the 14th day of September, 1864, when intestate came from Texas for her; she at his, the said intestate's, special instance and request, left said places, and went with him to reside with him upon his farm at or near Dallas, and afterwards on the Brazos River, in the State of Texas; that upon their arrival in Texas, said intestate became a helpless invalid, completely broken down in health, and physically unable to take care of himself or the large number of slaves of which he was then possessed; that plaintiff continued her services for and with the said Elisha Worthington under and by his employment, and at his special instance and request taking charge of his household affairs and generally superintending the management of his affairs and business, which among other things included the superintending and care of over five hundred slaves at that time belonging to intestate; that afterwards, to wit, in the winter of 1866, plaintiff returned to Arkansas with said intestate, still acting in the capacity of confidential agent, attendant, and servant, and continued with him as the keeper of all his accounts, money, and affairs, and as confidential housekeeper until the death of said Worthington on the 19th day of November, 1873.

6 Plaintiff further states that said services rendered and work and labor done and performed for the said Elisha Worthington were done upon the following conditions and promises made by intestate at the time: 1st, that he leave her his estate at his death, as he had no heirs of his body, being unmarried, and having no legitimate children; and, 2nd, that he valued her services and friendship at the sum of two hundred and fifty thousand dollars, because plaintiff had devoted her life to him to whom she owed nothing, and had been to him a support and assistance in the midst of all his trials and troubles. Wherefore plaintiff says that in consideration therefor she ought of right to have and recover from his estate the amount here sued for.

Fourth. Plaintiff further says that she ought to have and recover of and from the said defendants, Edward T. and Isaac Worthington, as administrators of the estate of Elisha Worthington, deceased, the sum of one hundred thousand for services rendered and work and labor done at the special instance and request and by the employment of defendants' intestate, said services extending over a period of thirteen years, to wit, from the 5th day of December, 1860, to 19th November, 1873, because she says that said intestate, Elisha Worthington, promised that at his death he would leave to plaintiff two of his said plantations, to wit, "Red Leaf" and "Eminence," in consideration therefor, and that the same were worth at the time of said promises the sum of two hundred and fifty thousand dollars by the estimate of said intestate, and are now worth the sum of one hundred thousand dollars, and that the value of said lands is the criterion of the value placed by intestate upon the services of plaintiff as aforesaid, and which he had repeatedly promised to give her at his death. Plaintiff further shows that the said

7 intestate never carried out his said promises so often and so earnestly made to plaintiff, and in consideration of which she had devoted her life to his service, because, she says, he was taken suddenly and violently ill, and that before he was aware of his true condition, and before he had time to carry out his said intentions and promises, he suddenly died, leaving no written will nor other provision for this plaintff, for which reason she is now compelled to resort to this honorable court to enforce her rights herein. Wherefore, the premises considered, plaintiff prays judgment against the defendants as such admin-

istrators aforesaid for the sum of one hundred thousand dollars, and for other proper relief.

WM. H. SUTTON, &
DODGE & JOHNSON,
Att'ys for Plaintiff.

STATE OF PENNSYLVANIA,
County of Alleghany:

I, Martha W. Mason, do solemnly swear that the facts and statements made and set forth in the foregoing complaint are true and correct, to the best of my knowledge and belief: So help me God.

MARTHA W. MASON.

Sworn to and subscribed before me this 22nd day of February, A. D. 1875.

[SEAL.] H. D. GAMBLE,
Clerk of the U. S. Circuit Court, Western District of Penna.

Bill of particulars.

Martha W. Mason, plaintiff above named, files the following bill of particulars of services rendered, to wit, to services rendered as agent of said Elisha Worthington, in keeping possession of Sunny Side plantation, all the books, papers, and household effects of said Worthington, from the 5th day of December, A. D. 1860, to the 14th day of September, A. D. 1864, said Worthington being for the most of said time absent, and the entire charge and responsibility of said interests being in plaintiff. To continuation of services as agent of said Elisha Worthington, by going at his instance and request to the State of Texas, to give care and attention personally to said Worthington, who was at the time a great invalid, and also to attend his property and interests, then consisting of over five hundred (500) slaves, teams of mules, &c., then in Texas. Plaintiff continued to render such services to said Worthington in Texas until the fall of 1865, at which time, at his instance and request, she returned to Chicot County with him and such of his property as he still retained. That after his return to Chicot County, at said Worthington's instance and request, she continued to devote her time and attention to his interests by taking charge of his books, papers, money matters, &c., as well as superintending the general management of his household affairs and rendering attention to his personal comfort, both in sickness and in health, from the period last aforesaid until the 19th day of November, A. D. 1873, said Worthington promising and assuring the plaintiff that at his death he would provide for her in property which he estimated at $250,000, but which, allowing for shrinkage in value, plaintiff says is now worth $100,000, and that this sum is due her by said defendants.

STATE OF PENNSYLVANIA,
County of Allegheny:

I, Martha W. Mason, do solemnly swear that the facts and statements made and set forth in the foregoing complaint are true and correct, to the best of my knowledge and belief: So help me God.

MARTHA W. MASON.

Sworn to and subscribed before me this 22 day of February, A. D. 1875.

H. D. GAMBLE. [SEAL.]
Clerk of the U. S. Circuit Court, West Dist. of Penna.

Estate of E. Worthington, deceased, to Martha W. Mason, Dr.

To services rendered from the 5th day of December, 1860, to the 19th day of November, 1873, inclusive, in and about the person, interests, and business of the deceased $100,000 00

Pittsburgh, Pa., November 3, 1874.

COMMONWEALTH OF PENNSYLVANIA,
Allegheny County:

Personally appeared before me, a duly commissioned notary public within and for the county and State aforesaid, Martha W. Mason, to me personally known, who, after being first duly sworn, deposed and said that the estate of Elisha Worthington, deceased, is justly indebted to her in the sum of one hundred thousand dollars, witnessed by the above account; that no part of the same has been paid and nothing delivered in satisfaction thereof, and the whole of the above sum remains due and unpaid.

MARTHA W. MASON

Sworn to and subscribed before me this the 3 day of November, A. D. 1874.

[SEAL.] R. A. BALPH,
Notary Public.

(Endorsed as follows:)

Presented, examined, and rejected this 3 day of December, 1874.

E. T. WORTHINGTON.
ISAAC M. WORTHINGTON,
Adms. est. E. Worthington, dec'd.

10 Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 25th day of October, A. D. 1875, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November 18th, 1875:

Come the defendants, by D. H. Reynolds, esq., their attorney, and filed herein their answer; which answer is in the words and figures following, to wit:

The defendants, Edward T. Worthington and Isaac M. Worthington, as administrators of the estate of Elisha Worthington, deceased, for answer to the complaint of Martha W. Mason, plaintiff herein, state that it is true, as stated in said complaint, that the paper marked Exhibit B was presented to them, as such administrators, on the 3rd day of December, 1874, and that the same was duly examined and considered by them, and that they at that time rejected and refused to allow the same as a claim against said estate; but they deny that the same was presented within one year after the date of their letters of administration, and state that said letters bear date November 25th, 1873, and more than one year prior to the presentation of plaintiff's demand to them.

And defendants deny that plaintiff, as agent of said intestate, rendered services in keeping possession of Sunny Side plantation and all the books, papers, and household effects of said intestate from December 5th, 1860, to September 14th, 1864, and that the entire charge and responsibility of said interests were in the plaintiff, but state that said intestate remained in possession of said Sunny Side plantation in per-

son, until the fall of 1862, when he moved nearly all the slaves and other movable property from the county of Chicot to Red River,
11 in the State of Arkansas, and that he left the plaintiff with her brother, James W. Mason, who had charge of looking after the plantation and the remnant of property left behind on the removal of said intestate, the said James W. Mason and the plaintiff being at the time slaves and the property of said intestate, a few other slaves being left with said James W. Mason and plaintiff to assist in looking after and preserving the other property left behind on the removal of intestate from Chicot County.

And defendants admit that plaintiff went to Texas with intestate in 1864, but deny that she went as the agent of said intestate or that she acted as agent for him on his way to Texas or while in Texas, but state that she was at the time the slave of said intestate, and that she was taken by said intestate as such slave to the State of Texas, and that she continued to serve him as his slave until she was set free in 1865 by the result of the war, and that she continued with the said intestate in Texas until the fall of 1865, when she, with a large number of others, the former slaves of said intestate, were by him taken from Texas to Chicot County.

And defendants admit that plaintiff, for a portion of the time after she was brought back from Texas by said intestate, worked for him, doing his cooking and washing, and attending to other household duties such as are usually performed by servants, but deny that she ever took charge of his books, papers, and money matters, or that she had the general management and control of his household affairs other than as a servant; and deny that said intestate promised or assured her that he would provide for her at his death in property which he estimated to be worth $250,000, or to in any other ma'ner provide for her at his death; but state that the plaintiff served said intestate as a servant for the greater part of the time from early in 1868 until his death, in November, 1873, and that she occasionally served him before
12 1868 and after his return from Texas in the fall of 1865; that she never acted as his confidential agent or manager and never had charge of his money matters or other business; that during the years 1871 and 1873 she at times assisted him in keeping his accounts with the tenants on the plantation by setting down the articles furnished, with the price, and when intestate was settling with the tenants and laborers would assist by reading off items from the books, &c., but was never intrusted by said intestate to make contracts or settlements with tenants or take any charge of the business of said intestate, and was never intrusted with even setting down in a book the articles furnished to tenants prior to 1871.

And defendants further state that said plaintiff was paid for her said services from time to time by said intestate, and that at the death of said intestate he did not owe plaintiff any sum of money for such services, the same having been fully, amply, and completely paid off by said intestate at and before that time, said intestate having paid her more than her services were reasonably worth.

And defendants deny that said intestate ever promised to pay said plaintiff said sum of one hundred thousand dollars or any other sum of money at his death, or to give her all his estate at his de'th, or to give her Red Leaf and Eminence plantations at his death; but state that said intestate was in principle opposed to making a will and that he expressed the determination to dispose of his property during life that he might desire to go in any manner other than as provided by law; that

for services of plaintiff he paid her amply and fully by clothing, horse and buggy, diamonds, jewelry, money, &c., which he paid to her during his life-time.

And defendants admit that said intestate was the owner of Sunny Side, Red Leaf, Eminence, and So So plantations in 1860, and that they were of great value, and that he was also the owner of a large
13 number of slaves and other property of great value, and that all of said property was probably worth one-half million of dollars, as stated in said complaint, but they state that said intestate was at that time very largely in debt, and that during the war and by the result of the war he lost his slaves and nearly all his personal property, and his lands were greatly depreciated in value; and that in 1866 he sold Sunny Side plantation in order to pay some of his debts; and that in June, 1867, he sold Red Leaf and Eminence plantations to pay other of his said debts; and that afterwards on the day of , 186 , he went into voluntary bankruptcy, and on the day of , 18 , he was as such bankrupt duly discharged by the district court of the United States for the eastern district of Arkansas.

And defendants admit that it may be true as alleged that plaintiff is the natural daughter of said intestate, but they deny that such supposed relationship in any manner effects the rights of plaintiff in this suit for services rendered by her to said intestate.

And the said defendants having fully answered all the allegations in said complaint, pray to be dismissed with their reasonable costs, and for all other proper relief.

A. H. GARLAND AND D. H. REYNOLDS,
Att'ys for Defendants.

STATE OF ARKANSAS,
County of Pulaski:

I, Isaac M. Worthington, one of the defendants in this suit, state that the facts set forth in the foregoing answer are true to the best of my knowledge, information, and belief.

ISAAC M. WORTHINGTON.

Sworn to before me this 15th day of November, 1875.

L. E. BARBER, *Clerk.*

Filed November 18, 1875.

RALPH L. GOODRICH, *Clerk.*

14 Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 10th day of April, A. D. 1876, at the United States court room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on May 8th, 1876:

MARTHA W. MASON
v.
EDWARD T. WORTHINGTON AND ISAAC M. Worthington, adm's.

Comes the plaintiff, by Dodge and Johnson and Wm. H. Sutton, esqs., her attorneys, and come the defendants by D. H. Reynolds, esq., their attorney, and both parties announcing themselves ready for trial, a jury came, to wit: T. W. Wilson, Jefferson G. Botsford, W. A. Ober, S. A.

Wiggins, E. D. Ayres, Patrick Raleigh, W. H. Naulty, C. O. Kimball, J. M. Deitrich, Marmaduke Osborne, H. J. Owens, and F. M. Ritchie, being twelve good and lawful men of the district, who were duly tried, empannelled, and sworn well and truly to try the issues joined between the plaintiff and the defendants, and a true verdict give according to the law and the evidence, and thereupon the jury proceed to hear the evidence, and the trial hereof not being concluded, the same is continued until to morrow morning.

And on May 9th, 1876, as follows:

Comes the plaintiff, by Dodge and Johnson and Wm. H. Sutton, esqs., her attorneys, and come the defendants, by D. H. Reynolds and Gallagher and Newton, esqs., their attorneys, and come the jury, to wit, T. W. Wilson, Jefferson G. Botsford, W. A. Ober, S. A. Wiggins, E. D. Ayres, Patrick Raleigh, W. H. Naulty, C. O. Kimball, J. M. Deitrich, M. Osborne, H. J. Owens, and F. M. Ritchie, and the trial hereof not being concluded on yesterday, the same is now resumed; and the trial hereof not being concluded, the same is continued until to-morrow morning.

And on May 10th, 1876, as follows:

Comes the plaintiff, by Dodge and Johnson and Wm. H. Sutton, esqs., her attorneys, and come the defendants, by D. H. Reynolds and Gallagher and Newton, esqs., their attorneys, and come the jury, to wit, T. W. Wilson, Jefferson G. Botsford, W. A. Ober, S. A. Wiggins, E. D. Ayres, Patrick Raleigh, W. H. Naulty, C. O. Kimball, J. M. Deitrich, M. Osborne, H. J. Owens, and F. M. Ritchie, and the trial hereof not being concluded on yesterday, the same is now resumed; and the trial hereof not being concluded, the same is continued until to-morrow morning.

And on May 11th, 1876, as follows:

Comes the plaintiff, by Dodge and Johnson and Wm. H. Sutton, esqs., her attorneys, and come the defendants, by D. H. Reynolds and Gallagher and Newton, esqs., their attorneys, and come the jury, to wit, T. W. Wilson, Jefferson G. Botsford, W. A. Ober, S. A. Wiggins, E. D. Ayres, Patrick Raleigh, W. H. Naulty, C. O. Kimball, J. M. Deitrich, Marmaduke Osborne, H. J. Owens, and F. M. Ritchie, and the trial hereof not being concluded on yesterday the same is now resumed, and during the progress of the trial the defendants ask and obtain leave to amend their answer by inserting the following amendment: "But if any such agreement was made it was void under the statute of frauds unless in writing," which is accordingly done; and the trial hereof not being concluded, the same is continued until to morrow morning.

And on May 12th, 1876, as follows:

Comes the plaintiff, by Dodge and Johnson and Wm. H. Sutton, esqs., her attorneys, and come the defendants, by D. H. Reynolds and Gallagher and Newton, esqs., their attorneys, and come the jury, to wit, T. W. Wilson, Jefferson G. Botsford, W. A. Ober, S. A. Wiggins, E. D. Ayres, Patrick Raleigh, W. H. Naulty, C. O. Kimball, J. M. Deitrich, M. Osborne, H. J. Owens, and F. M. Ritchie, and the trial hereof not being concluded on yesterday, the same is now resumed, and the jury having heard all the evidence as well on the part of the plaintiff as of the defendants, and being charged and instructed by the

court, retired to consult of their verdict, and afterwards returned into court the following verdict: "We, the jury, find the issues for the plaintiff, and assess her damages at twelve thousand dollars."

It is therefore considered, ordered, and adjudged that said plaintiff, Martha W. Mason, do have and recover of and from said defendants, Edward T. Worthington and Isaac M. Worthington, as administrators of Elisha Worthington, deceased, the sum of twelve thousand dollars ($12,000.00) for her damages, with interest on said damages at the rate of six per centum per annum from this date, together with all her costs in and about this suit expended, to be levied of the goods and chattels and lands and tenements which were of the said Elisha Worthington, deceased, at the time of his death in the hands of the said Edward T. Worthington and Isaac M. Worthington, as administrators, remaining to be administered, if so much thereof in their hands to be administered they have, and it is further ordered by the court that the defendants, as administrators as aforesaid, shall pay the amount of the aforesaid judgment in due course of administration, and failing to do so, it is ordered that the plaintiff have execution therefor.

And on May 15th, 1876, as follows:

Come the defendants, by D. H. Reynolds and Gallagher and Newton, esqs., their attorneys, and file herein their motion in arrest of
17 judgment and for a new trial, which are heard, argued, and submitted to the court; and the court being well advised considers that the same be denied; and the said defendants ask and obtain leave to file their bill of exceptions at a future day during the present term.

And on May 17th, 1876, as follows:

Come the defendants, by D. H. Reynolds and Gallagher and Newton, esqs., their attorneys, and file herein their bill of exceptions, which is signed by the court and made part of the record herein.

Which bill of exceptions is in the words and figures following, to wit:

Be it remembered that on the trial of this cause the defendants prayed the court to charge the jury as follows:

The attorneys for the defense in case of Martha W. Mason against E. T. and I. M. Worthington, as adm'rs of est. of Elisha Worthington, deceased, would respectfully submit to the court the following propositions of law as governing the said case their behalf, viz:

First. That if the jury believe from the evidence that the plaintiff was born a slave, she was not under the law then existing entitled to be the owner of property by distribution or inheritance, nor could she, while such slavery existed, be the owner of property, either by gift, purchase, or contract, in her own right, but the same belonged to her master. (Moss v. Sandefer, ex'r, 15 Arks., 381; 1 Blackstone Com., 424 (margin); 1 Domat's Civil Law, p. 143, art. 1, sec. 97; 4 Dessasune, 266, 267; 1 Stevens, 320; 9 Ala., 271; 2 Pick., 424.)

Second. That if the jury believe from the evidence that the plaintiff was the slave of Elisha Worthington, and was afterwards manumitted by the law, she was not entitled after that event to compensation for services for remaining with him and serving him until she had
18 severed connection with him, or had asserted such right, and by express contract with him, definite and understood in law, had remained with him as a servant under a contract for compensation, definite and agreed upon between them, and then only for reasonable

compensation for the kind or nature of the services, as rendered, and her manumission could only date from the repeal or abrogation of the law of the State recognizing slavery wherein she was a resident at the time whereby slavery ceased to exist. (Gould's Digest, p. 483, title, Emancipation; Jackson v. Bob, 18 Arks., 399, and authorities there cited.)

Third. That, under the law of slavery existing in Arkansas, if the jury believe the plaintiff was a slave thereunder, no right of family heirship, connection, descent, or distribution could exist, and any subsequent manumission or emancipation under any law could not confer upon any slave any such right. See authorities cited to second instruction. (19 Howard, 452; Strader et al. v. Graham B. Monroe, 10 Howard, 82; Gould's Digest, 441.) Sec. 4 requires, even in cases of free-born whites, that they must intermarry and recognize children previously born before they can be entitled to any right as of kin.

Fourth. Even in case of apprenticeship of a minor child, until she sever her connection with her master or parent, these rules would apply with the proper qualifications.

Fifth. Even if the jury believe from the evidence that a lawful contract was entered into between plaintiff and decedent, to the effect or purport that if the plaintiff would remain with and serve and care for him (intestate) that he would do better for her than she could do for herself, or to that purport, it will, before plaintiff can recover, devolve upon her to prove that said decedent did not so perform.

Sixth. That the marital relation is looked upon as one of the foundation stones of our government and part of its law, and illegiti-
19 mate children have no rights in court, to assert a claim in court, against the estate of a deceased father on a quantum meruit for care, affection, &c., as children, but can alone recover upon an express legal contract proven by them, and not against public policy.

Seventh. That if plaintiff was born a negro slave in the State of Arkansas, no claim or right can arise as against a white person, the marriage of white and black persons being absolutely prohibited whilst she was in such servitude, or for any matter that originated during that time, as she was not a civil person recognized by law for that purpose or with that right if she should afterwards become manumitted or emancipated by law, and ask that the same may be included in the charge given by the court to the jury in this behalf.

D. H. REYNOLDS AND
GALLAGHER AND NEWTON,
For Defendants.

Which instructions so prayed by the defendants the court refused to give. To which action of the court in refusing to give said instructions the defendants at the time excepted, and thereupon the court, on its own motion, charged the jury in chief as follows:

I will charge you upon such propositions of law as I find pertinent to the case. The plaintiff brings this action to recover compensation for personal services, which she alleges were rendered and performed for the intestate, Elisha Worthington, for a period of thirteen years, commencing in the year 1860 and terminating on the death of the intestate, which occurred on the 19th day of November, 1873. She alleges that she entered upon said services, and continued therein until the death of
the intestate, in pursuance of a contract, agreement, and under-
20 standing had and entered into between her and the intestate in substance and to the effect that if the plaintiff would enter into

such service for the intestate, and continue so to serve him during his life, that the intestate would at or before his death, in some proper and effectual manner, by conveyance or devise, convey to the plaintiff two of his plantations, known as "Red Leaf" and "Eminence," in consideration of and in payment for said services. And she avers performance of said contract on her part, and that Colonel Worthington died without complying with said contract on his part, and without paying for said services.

The defendants deny that any such agreement or contract was entered into between the plaintiff and the intestate. And they further set up and rely upon the statute of frauds, and say if any such contract was made it was not in writing, as required by that statute, and is therefore void.

In reference to this special contract it is not claimed by the plaintiff that it was reduced to writing, and though you may find that such a contract was in fact made and entered into verbally between the parties, the plaintiff cannot in this action recover upon that contract, because it belongs to a class of contracts that by the statute of frauds to make them effectual and binding upon the parties is required to be reduced to writing. And the defendants having availed themselves of this defense, no recovery can be had on that contract, although you may find it was in fact entered into.

But the plaintiff, probably in view of the legal impediment to a recovery on this special contract, even if proved, has made a claim in this action for the reasonable and fair value of her alleged services rendered to the intestate for the same period of thirteen years. And upon this count of her complaint she is entitled to recover the reasonable and fair
21 value of her services for the intestate. And if you find from the evidence that the plaintiff performed services for the intestate as alleged in the complaint, then you will allow her therefor a reasonable and just compensation for the same, deducting therefrom any and all payments, if any, made to her on account of the same.

In the argument of the case allusion was made to certain specific articles of personal property, which it was said the plaintiff had received from the intestate, and for which the estate should be allowed a credit. Whether you make any allowance for those items, gentlemen, will depend upon whether they were gifts or presents from the intestate to the plaintiff, as claimed by the plaintiff, or whether they were delivered as a part payment, intended to be so, for the services rendered as claimed by the defendants. If from the evidence you find that these articles, or any portion of them, were given to the plaintiff by the intestate as a present, and so received by the plaintiff at the time, then you can make no deduction for such of said articles as were given and received as presents.

To return to the services. What the character of these services were, and what would be a reasonable and just compensation therefor under all the circumstances detailed in the evidence, it rests with you to determine from all the evidence in the case. And in considering the question of what would be a reasonable and just compensation to the plaintiff for her services, you are at liberty to take into consideration any evidence tending to establish the special agreement heretofore referred to. And if you find such special agreement or contract was made; that is, that the intestate, for the purpose of inducing the plaintiff to remain with him and render the services alleged to have been rendered, agreed to convey or devise to the plaintiff in payment for such services
22 specified portions or parcels of his estate, and that the plaintiff did remain with the intestate and perform the required services

until the death of the intestate, then, as throwing light on the transaction between the parties, and as tending to show the value the parties themselves placed upon the services of the plaintiff, you are at liberty to take into consideration the value as disclosed by the evidence of such specific parcels of real estate which you may find the intestate agreed to convey or devise to plaintiff for such services, and considering the specific contract (if you find it proven) for this purpose only, it rests with you, under your oaths and judgments, considering all the facts and circumstances in the case disclosed by the evidence, to say what would be a fair, reasonable, and just compensation to the plaintiff for her services. But in no event can you allow the plaintiff a greater sum than the value of the specific property which the plaintiff claims was to be conveyed or devised to her therefor.

Among the conceded facts in the case are these: That the mother of the plaintiff was a slave, and the property of Colonel Worthington at the date of plaintiff's birth, and that the plaintiff is the natural daughter of Colonel Worthington. The mother of the plaintiff having been a slave at the date of plaintiff's birth, it results that she was born a slave, and at her birth was the property of Colonel Worthington, her natural father.

There is some contention between the counsel for the respective parties as to when the relation of master and slave between the intestate and the plaintiff ceased to exist.

The plaintiff insists she obtained her freedom on the 24th day of July, 1858, at which time the intestate voluntarily took her to Oberlin, in the State of Ohio, and there placed her in school to be educated, and where she remained until about the beginning of the late civil war, when she voluntarily returned to the residence of the intestate in this State.

23 The defendants insist that this action on the part of the intestate, and the residence of the plaintiff for the purpose and for the period mentioned in the State of Ohio, did not operate to dissolve the relation of master and slave, and that upon the return of the plaintiff to this State in 1860 she was still the slave of the intestate, and continued so to be until she was emancipated by the results of the war.

The witness, Cornelia C. Bardwell, of Oberlin, Ohio, testified that on the 24th day of July, 1858, Col. Worthington brought the plaintiff to her house in Oberlin, and said he intended to give plaintiff a complete and thorough education, embracing music and drawing, and that he would pay all her expenses; that plaintiff remained at Oberlin until about the beginnig of the war, at which time, it is admitted, she returned to the house of Col. Worthington in this State. Mrs. Bardwell further says that during the residence of plaintiff at Oberlin, "she was not engaged in any employment or service for Col. Worthinnton; on the contrary, he directed that she should not be required to take the care of her own room, but that she should have all the privileges and advantages of a lady, and directed that she should have all the literary and social advantages that the place afforded." If you find the facts to be as stated by Mrs. Bradwell (and I do not understand that they are contested), the law applicable to these facts is well settled, both upon principle and authority.

When Col. Worthington voluntarily took the plaintiff into the State of Ohio and placed her at school, as detailed by Mrs. Bradwell, the constitution and laws of that State immediately dissolved the relation of master and slave previously existing between Col. Worthington and the

plaintiff, and the plaintiff became a free woman, and could never thereafter lawfully be claimed or held by Col. Worthington as his slave
24 in virtue of his previous ownership of her. Nor did the subsequent return of the plaintiff from Ohio to the residence of the intestate in this State affect her rights as a free woman, which she had acquired by the voluntary action of the intestate, and by the operation of the constitution and laws of the State of Ohio.

Upon the return of the plaintiff from Ohio to this State, the intestate had no more legal right to claim the plaintiff as his slave or reduce her to slavery than he would have had to claim as a slave or reduce to slavery a native and free born woman of the State of Ohio who might have chanced to have been within the limits of this State.

It results that when the plaintiff returned from Ohio to this State, in December, 1860, she returned and remained a free woman, and her mother being a slave and by law deprived of the guardianship of her child, the plaintiff, and the plaintiff having no father in the eye of the law, and certainly none who by law was made her guardian, and having no legal guardian, she was upon her return to this State remitted to her own resources, and to the enjoyment of "life, liberty and the pursuit of happiness," rights declared by our fathers a century ago to be inalienable. And from that date she was entitled to the fruits of her own labor, and the benefits of her valid and lawful contracts, as fully and completely as though she had been born free and her mother had been a free white woman.

You, of course, understand, gentlemen, that the plaintiff is not a legal heir to the estate of her natural father, and that she cannot, as indeed she does not, claim anything in this action simply and solely by virtue of the fact of being the natural daughter of the intestate. Neither this fact, nor the fact that the intestate left no legitimate children to inherit his estate, nor the fact, if you find it to be a fact, that the
25 intestate had no affection or regard for those of his kindred to whom, under the law, his estate descends, will authorize you to award to the plaintiff anything in this action.

The evidence of these several points is before you without objection from either party, and may be considered by you in connection with the other evidence in the case in so far as it tends to explain or throw light on the alleged relations and contracts between the plaintiff and the intestate, and the circumstances and conditions upon which the plaintiff lived with and served the intestate, and the compensation it was agreed or understood she should receive therefor.

It is a conceded fact in the case that in 1868 the intestate received a discharge as a bankrupt. The legal effect of such discharge was to absolve the intestate from any legal obligation to pay any of his debts contracted prior to the date that he was adjudged a bankrupt, which was on the 29th day of February, 1868. To remove the bar interposed by this discharge in bankruptcy to the right to recover for services prior to that date, the plaintiff claims that subsequent to his discharge in bankruptcy the intestate recognized his obligation to pay the plaintiff for such services, and promised to pay and compensate her therefor. And if you find from the evidence that the intestate did so promise after his discharge in bankruptcy, then such discharge is not a good defence to an action for such services. One who has received a discharge in bankruptcy may waive the right thus given him to defeat a recovery on a debt due from him prior to his bankruptcy, and when he does so and promises to pay such a debt, such promise is binding on him and his administrators, and the creditor may recover on the original

debt in the same manner as though the debtor had never received such discharge.

26 The statute of limitations is not interposed as a defence in this case, and cannot be considered by the jury as a defence to any part of the plaintiff's claim.

I say further to you, gentlemen, that the burden of proof is on the plaintiff to satisfy you of her right to recover, and as to the amount she ought to have. I say to you, further, that you are the sole judges of the evidence, of the credibility of the witnesses, and of the weight you may attach to the evidence of each one of them. If there is a conflict between witnesses on any material point, it is your duty, if you can, to reconcile it, and to harmonize them so as to make them all speak the truth; but if the difference is irreconcileable, then you must determine the fact according as you give credit to one or the other. You are the sole judges of the evidence, and of the weight of the evidence, and all matters of fact in this case must be determined upon your verdict. It is not disguised that there are many facts and circumstances detailed in the evidence before you in this case well calculated to excite prejudice in the one direction and sympathy in another.

I need scarcely say to such an intelligent jury as I am now addressing that you understand, gentlemen, that the action of courts and verdicts of juries are not to be based upon either prejudice or sympathy; they are to be based, just as you promised when you took your oaths, upon "the law and the evidence." The court has announced to you all the legal principles that have any bearing in this case. You have heard all the evidence, and upon your oaths, as sensible, intelligent, and just men, it is for you to say what, if anything, the plaintiff shall recover. If you find for the plaintiff, the form of your verdict will be, "We, the jury, find for the plaintiff, and assess the damages at," as many dollars as you may find. If you find for the defendants,

27 you will simply say, "We, the jury, find for the defendants."

And the defendants excepted at the time said charge was given by the court to the following parts and thereof, to wit, to so much of said charge as states the law to be that if Col. Worthington, the owner of the plaintiff as a slave, took the plaintiff to Oberlin, in the State of Ohio, and there placed her in school to be educated, the constitution and laws of Ohio immediately dissolved the relation of master and slave previously existing between Col. Worthington and the plaintiff, and that the plaintiff thereby became a free woman, and could never thereafter lawfully be claimed or held by Col. Worthington as his slave in virtue of his previous ownership of her, and that the subsequent return of the plaintiff from the State of Ohio to the residence of the intestate in this State did not effect her liberty or rights as a free woman which she had acquired by the voluntary action of the intestate and by the operation of the constitution and laws of the State of Ohio.

And defendants, also, at the time excepted to the following clause of said instructions, to wit, "And in considering the question of what would be reasonable and just compensation to the plaintiff for her services, you are at liberty to take into consideration any evidence tending to establish the special agreement heretofore referred to, and if you find such special agreement a contract was made, that is, that the intestate, for the purpose of inducing the plaintiff to remain with him and render the services alleged to have been rendered, agreed to convey or devise to the plaintiff in payment for such services specified portions or parcels of his estate, and that the plaintiff did remain with the intestate and perform the required services until the death of the intestate,

then, as throwing light on the transactions between the parties, and as tending to show the value the parties themselves placed upon the
28 services of the plaintiff, you are at liberty to take into consideration the value as disclosed by the evidence of such specific parcels of real estate which you may find the intestate agreed to convey or devise to plaintiff for such services, and considering the special contract (if you find it proven) for this purpose only, it rests with you under your oaths and judgments, considering all the facts and circumstances in the case disclosed by the evidence, to say what would be a fair, reasonable and just compensation to the plaintiff for her services, but in no event can you allow the plaintiff a greater sum than the value of the specific property which plaintiff claims was to be conveyed or devised to her therefor."

But the court overruled the exceptions of said defendants to said instructions so excepted to, and gave said instructions to the jury in the connection and as set out in the charge in chief, and to the giving of said instructions so excepted to, and to the refusal to give the said instructions so prayed for by the defendants, the said defendants at the time excepted, and this his bill of exceptions is now here signed and sealed by the court and made part of the record.

HENRY C. CALDWELL. [SEAL.]
U. S. District Judge.

Filed May 17, 1876.

RALPH L. GOODRICH, *Clerk.*

And on July 14th, 1876, as follows:

Come the defendants by S. R. Cockrill, esq., their attorney, and file therein their citation and writ of error, which are allowed by the court, and also supersedeas bond, which is approved by the court, which supersedeas bond is as follows:

29 Know all men by these presents that we, Henry H. Hawkins, William Starling, George Read, Edward T. Worthington, William M. Worthington, William W. Worthington, Aaron W. Wickliffe, and Daniel H. Reynolds, and John G. S. Simms are held and firmly bound unto Martha W. Mason in the full and just sum of twenty-four thousand dollars, to be paid to the said Martha W. Mason, her certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals and dated this 8th day of July, 1876.

Whereas the appellants, Edward T. Worthington and Isaac M. Worthington, as administrators of the estate of Elisha Worthington, deceased, have taken an appeal from the judgment of the circuit court of the United States for the eastern district of Arkansas, rendered at its April term, 1876, and on the day of May, 1876, against them and in favor of the appellee, Martha W. Mason, for the sum of twelve thousand dollars with costs, and the appellants desire to supersede said judgment:

Now the condition of the above is such that if the said appellants will pay to the appellee all costs and all just damages for delay that may be adjudged against the appellants on the appeal, and also will satisfy and perform said judgment in case it shall be affirmed, and any judgment or order which the Supreme Court of the United States may render or order to be rendered by the inferior court, not exceeding in

amount or value the said judgment, then the above obligation to be void, else to remain in full force and virtue.

E. T. WORTHINGTON. [SEAL.]
H. H. HAWKINS. [SEAL.]
W. M. WORTHINGTON. [SEAL.]
W. W. WORTHINGTON, JR. [SEAL.]
A. W. WICKLIFFE. [SEAL.]
WM. STARLING. [SEAL.]
GEO. READ. [SEAL.]
D. H. REYNOLDS. [SEAL.]
30 JOHN G. B. SIMMS. [SEAL.]
I. W. WORTHINGTON, [SEAL.]
By A. H. GARLAND, *his Att'y.*

W. M. Worthington states that he is a resident of Washington County, State of Mississippi; that he is worth four thousand dollars beyond the amount of his debts, and that he owns an undivided half interest in real property in said county and Sate in the name of W. M. Ands. Worthington on the records of said county, and subject to execution, of the value of thirty thousand dollars.

W. M. WORTHINGTON.

Subscribed and sworn to before me this 8th day of July, 1876.
S. W. FERGUSON, [SEAL.]
U. S. Com'r.

W. W. Worthington, jr., states that he is a resident of Washington County, State of Mississippi; that he is worth four thousand dollars beyond the amount of his debts, and has real property in his name on the records of said county and State, and subject to execution, of the value of ten thousand dollars.

W. W. WORTHINGTON, JR.

Subscribed and sworn to before me this 8th day of July, 1876.
S. W. FERGUSON, [SEAL.]
U. S. Com'r.

A. W. Wickliffe states that he is a resident of Washington County, State of Mississippi; that he is worth four thousand dollars beyond the amount of his debts, and real property in said county and State in his name on the records of said county, and subject to execution, of the value of ten thousand dollars.

A. W. WICKLIFFE.

Subscribed and sworn to before me this 8th day of July, 1876.
S. W. FERGUSON, [SEAL.]
U. S. Com'r.

31 Wm. Starling states that he is a resident of Chicot County, State of Arkansas; that he is worth five thousand dollars beyond the amount of his debts, and has real property in his name on the records of said county and State, and subject to execution, of the value of five thousand dollars.

WM. STARLING.

Sworn to and subscribed before me this July 10th, 1876.
H. W. GRAVES, [SEAL.]
Clk Ct. Ct.,
By GEO. T. WILKERSON, *D. C.*

Geo. Read states that he is a resident of Chicot County, Arkansas; that he is worth five thousand dollars beyond the amount of his debts, and has real property in his name on the records of said county and State, and subject to execution, of the value of five thousand dollars.

GEO. READ.

Sworn to and subscribed before me this July 10th, 1876.

H. W. GRAVES, [SEAL.]
Clk Ct. Ct.,
By GEO. T. WILKERSON, *D. C.*

Daniel H. Reynolds states that he is a resident of Chicot County, Arkansas; that he is worth ten thousand dollars beyond the amount of his debts, and has real property in his name on the records of said county of the value of seven thousand dollars subject to execution.

D. H. REYNOLDS.

Sworn to before me this 10th day of July, A. D. 1876.

H. W. GRAVES, *Clerk.* [SEAL.]

H. H. Hawkins states that he is a resident of Chicot County, Arkansas; that he is worth eight thousand dollars beyond the amount of his debts, and has real property in his name on the records of said county of the value of eight thousand dollars subject to execution.

H. H. HAWKINS.

32 Sworn to before me this 10th day of July, A. D. 1876.

H. W. GRAVES,
Clerk Cir. Court.

John G. N. Simms states that he is a resident of Chicot County, Arkansas; that he is worth five thousand dollars beyond the amount of his debts, and has real property in his name on the records of said county and State, and subject to execution, of the value of five thousand dollars.

JOHN G. D. SIMMS.

Sworn to and subscribed before me July 10th, 1876.

H. W. GRAVES, *Clk*, [SEAL.]
By W. K. GRAVES, *D. C.*

I hereby nominate and appoint A. H. Garland my agent and attorney in fact for me and in my name to execute any bond that may be required to prosecute or sue out an appeal or writ of error to operate as a supersedeas in the case of Martha Mason v. E. T. and I. M. Worthington, adm'rs of E. Worthington, dec'd, lately pending in the U. S. cir. ct., at Little Rock, Ark's.

Given under my hand and seal this 12th July, 1876.

ISAAC M. WORTHINGTON, *Adm'r.* [SEAL.]

Filed, and taken, and approved as a supersedeas bond this 14th July, 1876.

HENRY C. CALDWELL,
Judge of the U. S. for East. Dist. Ark's.

And which citation is as follows:

33 By the honorable Henry C. Caldwell, one of the judges of the circuit court of the United States for the eastern district of Arkansas, in the 8th circuit.

To Martha W. Mason, or to Dodge & Johnson, esq's, her attorneys of record:

Whereas lately issued out of the circuit court of the United States a writ of error, directed to the judge of the circuit court of the United States for the eastern district of Arkansas, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judges thereof, between Martha W. Mason, plaintiff, and Edward T. Worthington and Isaac M. Worthington, as administrators of the estate of Elisha Worthington, deceased, defendants, a manifest error hath happened, to the great damage of the said defendants;

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the day of October next: you are, therefore, hereby cited to appear before the said Supreme Court at the city of Washington, on the said day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Little Rock, in the eastern district of Arkansas, in the 8th circuit, the fourteenth day of July, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred & first.

HENRY C. CALDWELL,
Dist. Judge.

We acknowledge service of the within.

DODGE & JOHNSON,
Of Counsel for Pl'tiff.

Filed July 14, 1876.

RALPH L. GOODRICH,
Clerk.

34 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the originals on file and remaining of record in my office.

In testimony whereof I have hereunto set my hand and the seal of this court, this 3d day of March, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first.

Attest.

[SEAL.] RALPH L. GOODRICH,
Clerk.

(Indorsement on cover:) No. 351. Edward T. Worthington and Isaac M. Worthington, as adm'rs of Elisha Worthington, deceased, plaintiffs in error, vs. Martha W. Mason. E. Arkansas C. C. U. S. Filed 31st March, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1879.—No. 121.

WORTHINGTONS, AS ADMINISTRATORS, PLAINTIFFS,

vs.

MARTHA W. MASON, DEFENDANT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR PLAINTIFFS.

Martha W. Mason sued the plaintiffs, as administrators of Elisha Worthington, in the court below, and in her complaint alleged ~~three~~ causes of actions—

"First. That the defendants, Edward T. Worthington and Isaac M. Worthington, as administrators of the estate of Elisha Worthington, deceased, are indebted to plaintiff in the sum of one hundred thousand dollars (100,000), for services rendered and for the work and labor of plaintiff by her before the death of defendants' intestate, Elisha Worthington, done and performed in and about the business and household affairs of the said intestate, Elisha Worthington, at his, the said Elisha Worthington's, special instance and request, and being so indebted the said intestate, Elisha Worthington, in consideration thereof, had at said time and at various and other times undertaken and promised plaintiff to pay her the said sum of money at his death. That said services rendered and work and labor done and performed extends continuously from the fall, to

wit, the 5th day of December, 1860, to the 19th day of November, 1873, when the said Elisha Worthington departed this life, and the said sum and consideration for said services only became due and payable upon the death of the said Elisha Worthington. Plaintiff states that no part or portion of said indebtedness has been paid or in any manner satisfied, although the defendants, as such administrators, have been requested so to do, so that the same remains wholly due and unpaid, all of which will more fully appear by reference to plaintiff's bill of particulars herewith filed, marked Exhibit A, and made a part of this complaint.

Second. That, as by law required, plaintiff presented her said claim of one hundred thousand dollars as aforesaid to the defendants, as such administrators as aforesaid, made out in due form of law, properly sworn to and duly presented within the time required by law, to wit, on the 3d day of December, 1874, the same being within one year from the date of granting letters of administration on the estate of said Worthington, deceased; that said claim upon being so presented was duly considered by said defendants as administrators, and by them was refused and rejected this, to wit, on the 3d day of December, 1874. All of which will more fully appear by reference to the original of said claim and account with the affidavit thereto made, and the indorsements made thereupon, marked Exhibit B, and made a part hereof.

Third. And for a further cause of action herein, plaintiff states that she is the natural daughter of the defendants' intestate, Elisha Worthington, so acknowledged, considered, and treated by him during the entire period of her service as aforesaid, and that she was born on the day of , 18 ; that as such natural daughter, on the 5th day of December, 1860, she entered into the service of the said Elisha Worthington, taking charge as his confidential agent of his estate, which at that time was worth over half a million of dollars, the same being situated in the county of Chicot, in the State of Arkansas, and consisting of certain plantations known as 'Sunny Side,' 'Red Leaf,' 'Eminence,' and 'So So,' plantations at that time places of magnitude and great value; that said places were situated upon or near the Mississippi River, and were exposed to great danger and devastation by reason of the war then

commencing between the North and South; that as such confidential agent and servant, at the request and by the employment of the said intestate, plaintiff remained upon said 'Sunny Side' plantation, taking care of and protecting the same from destruction and plunder, and did so remain in sole charge of said property until the 14th day of September, 1864, when intestate came from Texas for her; she at his, the said intestate's, special instance and request, left said places, and went with him to reside with him upon his farm at or near Dallas, and afterwards on the Brazos River, in the State of Texas; that upon their arrival in Texas, said intestate became a helpless invalid, completely broken down in health, and physically unable to take care of himself or the large number of slaves of which he was then possessed; that plaintiff continued her services for and with the said Elisha Worthington under and by his employment, and at his special instance and request taking charge of his household affairs and generally superintending the management of his affairs and business, which among other things included the superintending and care of over five hundred slaves at that time belonging to intestate; that afterwards, to wit, in the winter of 1866, plaintiff returned to Arkansas with said intestate, still acting in the capacity of confidential agent, attendant, and servant, and continued with him as the keeper of all his accounts, money, and affairs, and as confidential housekeeper, until the death of said Worthington on the 19th day of November, 1873.

Plaintiff further states that said services rendered and work and labor done and performed for the said Elisha Worthington were done upon the following conditions and promises made by intestate at the time: First, that he leave her his estate at his death, as he had no heirs of his body, being unmarried, and having no legitimate children; and second, that he valued her services and friendship at the sum of two hundred and fifty thousand dollars, because plaintiff had devoted her life to him, to whom she owed nothing, and had been to him a support and assistance in the midst of all his trials and troubles. Wherefore plaintiff says that in consideration therefor she ought of right to have and recover from his estate the amount here sued for.

Fourth. Plaintiff further says that she ought to have and recover of and from the said defendants, Edward T. and

Isaac Worthington, as administrators of the estate of Elisha Worthington, deceased, the sum of one hundred thousand for services rendered and work and labor done at the special instance and request and by the employment of defendants' intestate, said services extending over a period of thirteen years, to wit, from the 5th day of December, 1860, to 19th November, 1873, because she says that said intestate, Elisha Worthington, promised that at his death he would leave to plaintiff two of his said plantations, to wit, 'Red Leaf' and 'Eminence,' in consideration therefor, and that the same were worth at the time of said promises the sum of two hundred and fifty thousand dollars by the estimate of said intestate, and are now worth the sum of one hundred thousand dollars, and that the value of said lands is the criterion of the value placed by intestate upon the services of plaintiff as aforesaid, and which he had repeatedly promised to give her at his death. Plaintiff further shows that the said intestate never carried out his said promises so often and so earnestly made to plaintiff, and in consideration of which she had devoted her life to his service, because, she says, he was taken suddenly and violently ill, and that before he was aware of his true condition, and before he had time to carry out his said intentions and promises, he suddenly died, leaving no written will nor other provision for this plaintiff, for which reason she is now compelled to resort to this honorable court to enforce her rights herein. Wherefore, the premises considered, plaintiff prays judgment against the defendants, as such administrators aforesaid, for the sum of one hundred thousand dollars, and for other proper relief," &c.

Accompanying the complaint, the following bill of particulars appears:

"Martha W. Mason, plaintiff above named, files the following bill of particulars of services rendered, to wit, to services rendered as agent of said Elisha Worthington, in keeping possession of Sunny Side plantation, all the books, papers, and household effects of said Worthington, from the 5th day of December, A. D. 1860, to the 14th day of September, A. D. 1864, said Worthington being for the most of said time absent, and the entire charge and responsibility of said interests being in plaintiff. To contin-

uation of services as agent of said Elisha Worthington, by going at his instance and request to the State of Texas, to give care and attention personally to said Worthington, who was at the time a great invalid, and also to attend his property and interests, then consisting of over five hundred (500) slaves, teams of mules, &c., then in Texas. Plaintiff continued to render such services to said Worthington in Texas until the fall of 1865, at which time, at his instance and request, she returned to Chicot county with him and such of his property as he still retained. That after his return to Chicot county, at said Worthington's instance and request, she continued to devote her time and attention to his interests by taking charge of his books, papers, money matters, &c., as well as superintending the general management of his household affairs and rendering attention to his personal comfort, both in sickness and in health, from the period last aforesaid until the 19th day of November, A. D. 1873, said Worthington promising and assuring the plaintiff that at his death he would provide for her in property which he estimated at $250,000, but which, allowing for shrinkage in value, plaintiff says is now worth $100,000, and that this sum is due her by said defendants."

To this suit the plaintiffs in error appeared and filed the following answer:

"The defendants, Edward T. Worthington and Isaac M. Worthington, as administrators of the estate of Elisha Worthington, deceased, for answer to the complaint of Martha W. Mason, plaintiff herein, state that it is true, as stated in said complaint, that the paper marked Exhibit B was presented to them, as such administrators, on the 3d day of December, 1874, and that the same was duly examined and considered by them, and that they at that time rejected and refused to allow the same as a claim against said estate; but they deny that the same was presented within one year after the date of their letters of administration, and state that said letters bear date November 25, 1873, and more than one year prior to the presentation of plaintiff's demand to them.

And defendants deny that plaintiff, as agent of said intestate, rendered services in keeping possession of Sunny Side plantation and all the books, papers, and household

effects of said intestate from December 5, 1860, to September 14, 1864, and that the entire charge and responsibility of said interests were in the plaintiff, but state that said intestate remained in possession of said Sunny Side plantation in person, until the fall of 1862, when he moved nearly all the slaves and other movable property from the county of Chicot to Red River, in the State of Arkansas, and that he left the plaintiff with her brother, James W. Mason, who had charge of looking after the plantation and the remnant of property left behind on the removal of said intestate, the said James W. Mason and the plaintiff being at the time slaves and the property of said intestate, a few other slaves being left with said James W. Mason and plaintiff to assist in looking after and preserving the other property left behind on the removal of intestate from Chicot county.

And defendants admit that plaintiff went to Texas with intestate in 1864, but deny that she went as the agent of said intestate or that she acted as agent for him on his way to Texas or while in Texas, but state that she was at the time the slave of said intestate, and that she was taken by said intestate as such slave to the State of Texas, and that she continued to serve him as his slave until she was set free in 1865 by the result of the war, and that she continued with the said intestate in Texas until the fall of 1865, when she, with a large number of others, the former slaves of said intestate, were by him taken from Texas to Chicot county.

And defendants admit that plaintiff, for a portion of the time after she was brought back from Texas by said intestate, worked for him, doing his cooking and washing, and attending to other household duties, such as are usually performed by servants, but deny that she ever took charge of his books, papers, and money matters, or that she had the general management and control of his household affairs other than as a servant; and deny that said intestate promised or assured her that he would provide for her at his death in property which he estimated to be worth $250,000, or to in any other manner provide for her at his death; but state that the plaintiff served said intestate as a servant for the greater part of the time from early in 1868 until his death, in November, 1873, and that she occasionally served him before 1868 and after his return from

Texas in the fall of 1865; that she never acted as his confidential agent or manager and never had charge of his money matters or other business; that during the years 1871 and 1873 she at times assisted him in keeping his accounts with the tenants on the plantation by setting down the articles furnished, with the price, and when intestate was settling with the tenants and laborers would assist by reading off items from the books, &c., but was never intrusted by said intestate to make contracts or settlements with tenants or take any charge of the business of said intestate, and was never intrusted with even setting down in a book the articles furnished to tenants prior to 1871.

And defendants further state that said plaintiff was paid for her said services from time to time by said intestate, and that at the death of said intestate he did not owe plaintiff any sum of money for such services, the same having been fully, amply, and completely paid off by said intestate at and before that time, said intestate having paid her more than her services were reasonably worth.

And defendants deny that said intestate ever promised to pay said plaintiff said sum of one hundred thousand dollars or any other sum of money at his death, or to give her all his estate at his death, or to give her Red Leaf and Eminence plantations at his death; but state that said intestate was in principle opposed to making a will, and that he expressed the determination to dispose of his property during life that he might desire to go in any manner other than as provided by law; that for services of plaintiff he paid her amply and fully by clothing, horse and buggy, diamonds, jewelry, money, &c., which he paid to her during his life-time.

And defendants admit that said intestate was the owner of Sunny Side, Red Leaf, Eminence, and So So plantations in 1860, and that they were of great value, and that he was also the owner of a large number of slaves and other property of great value, and that all of said property was probably worth one-half million of dollars, as stated in said complaint, but they state that said intestate was at that time very largely in debt, and that during the war and by the result of the war he lost his slaves and nearly all his personal property, and his lands were greatly depreciated in value; and that in 1866 he sold Sunny Side plantation

in order to pay some of his debts; and that in June, 1867, he sold Red Leaf and Eminence plantations to pay other of his said debts; and that afterwards, on the day of , 186 , he went into voluntary bankruptcy, and on the day of , 18 , he was as such bankrupt duly discharged by the District Court of the United States for the Eastern District of Arkansas.

And defendants admit that it may be true as alleged that plaintiff is the natural daughter of said intestate, but they deny that such supposed relationship in any manner affects the rights of plaintiff in this suit for services rendered by her to said intestate.

And the said defendants having fully answered all the allegations in said complaint, pray to be dismissed with their reasonable costs, and for all other proper relief."

On this pleading a trial was had, and resulted in a verdict for Mason for $12,000, and judgment was entered accordingly. A motion for a new trial was made, and the court overruled it; to which ruling the Worthingtons excepted, tendered their bill of exceptions, which was signed, sealed, and made of record, and the case comes here on writ of error sued out by the Worthingtons.

It is deemed best to set out the bill of exceptions here as it appears of record. (Transcript, p. 9, *et seq.*) It is as follows:

"Be it remembered that on the trial of this cause the defendants prayed the court to charge the jury as follows:

The attorneys for the defense in case of Martha W. Mason against E. T. and I. M. Worthington, as adm'rs of estate of Elisha Worthington, deceased, would respectfully submit to the court the following propositions of law as governing the said case in their behalf, viz.:

First. That if the jury believe from the evidence that the plaintiff was born a slave, she was not under the law then existing entitled to be the owner of property by distribution or inheritance, nor could she, while such slavery existed, be the owner of property, either by gift, purchase, or contract, in her own right, but the same belonged to her master.

Second. That if the jury believe from the evidence that

the plaintiff was the slave of Elisha Worthington, and was afterwards manumitted by the law, she was not entitled after that event to compensation for services for remaining with him and serving him until she had severed connection with him, or had asserted such right, and by express contract with him, definite and understood in law, had remained with him as a servant under a contract for compensation, definite and agreed upon between them, and then only for reasonable compensation for the kind or nature of the services as rendered, and her manumission could only date from the repeal or abrogation of the law of the State recognizing slavery wherein she was a resident at the time whereby slavery ceased to exist.

Third. That, under the law of slavery existing in Arkansas, if the jury believe the plaintiff was a slave thereunder, no right of family heirship, connection, descent, or distribution could exist, and any subsequent manumission or emancipation under any law could not confer upon any slave any such right.

Fourth. Even in case of apprenticeship of a minor child, until she sever her connection with her master or parent, these rules would apply with the proper qualifications.

Fifth. Even if the jury believe from the evidence that a lawful contract was entered into between plaintiff and decedent, to the effect or purport that if the plaintiff would remain with and serve and care for him (intestate) that he would do better for her than she could do for herself, or to that purport, it will, before plaintiff can recover, devolve upon her to prove that said decedent did not so perform.

Sixth. That the marital relation is looked upon as one of the foundation stones of our government and part of its law, and illegitimate children have no rights in court, to assert a claim in court, against the estate of a deceased father on a quantum meruit for care, affection, &c., as children, but can alone recover upon an express legal contract proven by them, and not against public policy.

Seventh. That if plaintiff was born a negro slave in the State of Arkansas, no claim or right can arise as against a white person, the marriage of white and black persons being absolutely prohibited whilst she was in such servitude, or for any matter that originated during that time, as she was not a civil person recognized by law for that purpose or with that right if she should afterwards become manu-

mitted or emancipated by law:--and ask that the same may be included in the charge given by the court to the jury in this behalf.

Which instructions so prayed by the defendants the court refused to give. To which action of the court in refusing to give said instructions the defendants at the time excepted, and thereupon the court, on its own motion, charged the jury in chief as follows:

I will charge you upon such propositions of law as I find pertinent to the case. The plaintiff brings this action to recover compensation for personal services, which she alleges were rendered and performed for the intestate, Elisha Worthington, for a period of thirteen years, commencing in the year 1860 and terminating on the death of the intestate, which occurred on the 19th day of November, 1873. She alleges that she entered upon said services, and continued therein until the death of the intestate, in pursuance of a contract, agreement, and understanding had and entered into between her and the intestate, in substance and to the effect that if the plaintiff would enter into such service for the intestate, and continue so to serve him during his life, that the intestate would, at or before his death, in some proper and effectual manner, by conveyance or devise, convey to the plaintiff two of his plantations, known as Red Leaf and Eminence, in consideration of and in payment for said services. And she avers performance of said contract on her part, and that Colonel Worthington died without complying with said contract on his part, and without paying for said services.

The defendants deny that any such agreement or contract was entered into between the plaintiff and the intestate. And they further set up and rely upon the statute of frauds, and say it any such contract was made it was not in writing, as required by that statute, and is therefore void.

In reference to this special contract, it is not claimed by the plaintiff that it was reduced to writing, and though you may find that such a contract was in fact made and entered into verbally between the parties, the plaintiff cannot in this action recover upon that contract, because it belongs to a class of contracts that by the statute of frauds to make them effectual and binding upon the parties is required to be reduced to writing. And the defendants having availed

themselves of this defense, no recovery can be had on that contract, although you may find it was in fact entered into.

But the plaintiff, probably in view of the legal impediment to a recovery on this special contract, even if proved, has made a claim in this action for the reasonable and fair value of her alleged services rendered to the intestate for the same period of thirteen years. And upon this count of her complaint she is entitled to recover the reasonable and fair value of her services for the intestate. And if you find from the evidence that the plaintiff performed services for the intestate as alleged in the complaint, then you will allow her therefor a reasonable and just compensation for the same, deducting therefrom any and all payments, if any, made to her on account of the same.

In the argument of the case allusion was made to certain specific articles of personal property, which it was said the plaintiff had received from the intestate, and for which the estate should be allowed a credit. Whether you make any allowance for those items, gentlemen, will depend upon whether they were gifts or presents from the intestate to the plaintiff, as claimed by the plaintiff, or whether they were delivered as a part payment, intended to be so, for the services rendered, as claimed by the defendants. If from the evidence you find that these articles, or any portion of them, were given to the plaintiff by the intestate as a present, and so received by the plaintiff at the time, then you can make no deduction for such of said articles as were given and received as presents.

To return to the services. What the character of these services were, and what would be a reasonable and just compensation therefor under all the circumstances detailed in the evidence, it rests with you to determine from all the evidence in the case. And in considering the question of what would be a reasonable and just compensation to the plaintiff for her services, you are at liberty to take into consideration any evidence tending to establish the special agreement heretofore referred to. And if you find such special agreement or contract was made; that is, that the intestate, for the purpose of inducing the plaintiff to remain with him and render the services alleged to have been rendered, agreed to convey or devise to the plaintiff in payment for such services specified portions or parcels of his estate, and that the plaintiff did remain with

the intestate and perform the required services until the death of the intestate, then, as throwing light on the transaction between the parties, and as tending to show the value the parties themselves placed upon the services of the plaintiff, you are at liberty to take into consideration the value as disclosed by the evidence of such specific parcels of real estate which you may find the intestate agreed to convey or devise to plaintiff for such services, and considering the specific contract (if you find it proven) for this purpose only, it rests with you, under your oaths and judgments, considering all the facts and circumstances in the case disclosed by the evidence, to say what would be a fair, reasonable, and just compensation to the plaintiff for her services. But in no event can you allow the plaintiff a greater sum than the value of the specific property which the plaintiff claims was to be conveyed or devised to her therefor.

Among the conceded facts in the case are these: That the mother of plaintiff was a slave, and the property of Colonel Worthington at the date of plaintiff's birth, and that the plaintiff is the natural daughter of Colonel Worthington. The mother of the plaintiff having been a slave at the date of plaintiff's birth, it results that she was born a slave, and at her birth was the property of Colonel Worthington, her natural father.

There is some contention between the counsel for the respective parties as to when the relation of master and slave between the intestate and the plaintiff ceased to exist.

The plaintiff insists she obtained her freedom on the 24th day of July, 1858, at which time the intestate voluntarily took her to Oberlin, in the State of Ohio, and there placed her in school to be educated, and where she remained until about the beginning of the late civil war, when she voluntarily returned to the residence of the intestate in this State.

The defendants insist that this action on the part of the intestate, and the residence of the plaintiff for the purpose and for the period mentioned in the State of Ohio, did not operate to dissolve the relation of master and slave, and that upon the return of the plaintiff to this State in 1860 she was still the slave of the intestate, and continued so to be until she was emancipated by the results of the war.

The witness, Cornelia C. Bardwell, of Oberlin, Ohio, testified that on the 24th day of July, 1858, Colonel Worth-

ington brought the plaintiff to her house in Oberlin, and said he intended to give plaintiff a complete and thorough education, embracing music and drawing, and that he would pay all her expenses; that plaintiff remained at Oberlin until about the beginning of the war, at which time, it is admitted, she returned to the house of Colonel Worthington in this State. Mrs. Bardwell further says that during the residence of plaintiff at Oberlin, 'she was not engaged in any employment or service for Colonel Worthington; on the contrary, he directed that she should not be required to take the care of her own room, but that she should have all the privileges and advantages of a lady, and directed that she should have all the literary and social advantages that the place afforded.' If you find the facts to be as stated by Mrs. Bardwell, (and I do not understand that they are contested,) the law applicable to these facts is well settled, both upon principle and authority.

When Colonel Worthington voluntarily took the plaintiff into the State of Ohio and placed her at school, as detailed by Mrs. Bardwell, the constitution and laws of that State immediately dissolved the relation of master and slave previously existing between Colonel Worthington and the plaintiff, and the plaintiff became a free woman, and could never thereafter lawfully be claimed or held by Colonel Worthington as his slave in virtue of his previous ownership of her. Nor did the subsequent return of the plaintiff from Ohio to the residence of the intestate in this State affect her rights as a free woman, which she had acquired by the voluntary action of the intestate, and by the operation of the constitution and laws of the State of Ohio.

Upon the return of the plaintiff from Ohio to this State, the intestate had no more legal right to claim the plaintiff as his slave or reduce her to slavery than he would have had to claim as a slave or reduce to slavery a native and free-born woman of the State of Ohio who might have chanced to have been within the limits of this State.

It results that when the plaintiff returned from Ohio to this State, in December, 1860, she returned and remained a free woman, and her mother being a slave and by law deprived of the guardianship of her child, the plaintiff, and the plaintiff having no father in the eye of the law, and certainly none who by law was made her guardian, and having no legal guardian, she was upon her return to this

State remitted to her own resources, and to the enjoyment of 'life, liberty, and the pursuit of happiness,' rights declared by our fathers a century ago to be inalienable. And from that date she was entitled to the fruits of her own labor, and the benefits of her valid and lawful contracts, as fully and completely as though she had been born free and her mother had been a free white woman.

You, of course, understand, gentlemen, that the plaintiff is not a legal heir to the estate of her natural father, and that she cannot, as indeed she does not, claim anything in this action simply and solely by virtue of the fact of being the natural daughter of the intestate. Neither this fact, nor the fact that the intestate left no legitimate children to inherit his estate, nor the fact—if you find it to be a fact—that the intestate had no affection or regard for those of his kindred to whom, under the law, his estate descends, will authorize you to award to the plaintiff anything in this action.

The evidence of these several points is before you without objection from either party, and may be considered by you in connection with the other evidence in the case in so far as it tends to explain or throw light on the alleged relations and contracts between the plaintiff and the intestate, and the circumstances and conditions upon which the plaintiff lived with and served the intestate, and the compensation it was agreed or understood she should receive therefor.

It is a conceded fact in the case that in 1868 the intestate received a discharge as a bankrupt. The legal effect of such discharge was to absolve the intestate from any legal obligation to pay any of his debts contracted prior to the date that he was adjudged a bankrupt, which was on the 29th day of February, 1868. To remove the bar interposed by this discharge in bankruptcy to the right to recover for services prior to that date, the plaintiff claims that subsequent to his discharge in bankruptcy the intestate recognized his obligation to pay the plaintiff for such services, and promised to pay and compensate her therefor. And if you find from the evidence that the intestate did so promise after his discharge in bankruptcy, then such discharge is not a good defense to an action for such services. One who has received a discharge in bankruptcy may waive the right thus given him to defeat a recovery on a debt due from him

prior to his bankruptcy, and when he does so and promises to pay such a debt, such promise is binding on him and his administrators, and the creditor may recover on the original debt in the same manner as though the debtor had never received such discharge.

The statute of limitations is not interposed as a defense in this case, and cannot be considered by the jury as a defense to any part of the plaintiff's claim.

I say further to you, gentlemen, that the burden of proof is on the plaintiff to satisfy you of her right to recover, and as to the amount she ought to have. I say to you, further, that you are the sole judges of the evidence, of the credibility of the witnesses, and of the weight you may attach to the evidence of each one of them. If there is a conflict between witnesses on any material point, it is your duty, if you can, to reconcile it, and to harmonize them so as to make them all speak the truth; but if the difference is irreconcilable, then you must determine the fact according as you give credit to one or the other. You are the sole judges of the evidence, and of the weight of the evidence, and all matters of fact in this case must be determined upon your verdict. It is not disguised that there are many facts and circumstances detailed in the evidence before you in this case well calculated to excite prejudice in the one direction and sympathy in another.

I need scarcely say to such an intelligent jury as I am now addressing that you understand, gentlemen, that the action of courts and verdicts of juries are not to be based upon either prejudice or sympathy; they are to be based, just as you promised when you took your oaths, upon 'the law and the evidence.' The court has announced to you all the legal principles that have any bearing in this case. You have heard all the evidence, and upon your oaths, as sensible, intelligent, and just men, it is for you to say what, if anything, the plaintiff shall recover. If you find for the plaintiff, the form of your verdict will be, 'We, the jury, find for the plaintiff, and assess the damages at,' as many dollars as you may find. If you find for the defendants, you will simply say, 'We, the jury, find for the defendants.'

And the defendants excepted at the time said charge was given by the court to the following parts thereof, to wit, to so much of said charge as states the law to be that

if Colonel Worthington, the owner of the plaintiff as a slave, took the plaintiff to Oberlin, in the State of Ohio, and there placed her in school to be educated, the constitution and laws of Ohio immediately dissolved the relation of master and slave previously existing between Colonel Worthington and the plaintiff, and that the plaintiff thereby became a free woman, and could never thereafter lawfully be claimed or held by Colonel Worthington as his slave in virtue of his previous ownership of her, and that the subsequent return of the plaintiff from the State of Ohio to the residence of the intestate in this State did not affect her liberty or rights as a free woman which she had acquired by the voluntary action of the intestate and by the operation of the constitution and laws of the State of Ohio.

And defendants, also, at the time excepted to the following clause of said instructions, to wit: 'And in considering the question of what would be reasonable and just compensation to the plaintiff for her services, you are at liberty to take into consideration any evidence tending to establish the special agreement heretofore referred to, and if you find such special agreement or contract was made, that is, that the intestate, for the purpose of inducing the plaintiff to remain with him and render the services alleged to have been rendered, agreed to convey or devise to the plaintiff in payment for such services specified portions or parcels of his estate, and that the plaintiff did remain with the intestate and perform the required services until the death of the intestate, then, as throwing light on the transactions between the parties, and as tending to show the value the parties themselves placed upon the services of the plaintiff, you are at liberty to take into consideration the value as disclosed by the evidence of such specific parcels of real estate which you may find the intestate agreed to convey or devise to plaintiff for such services, and considering the special contract (if you find it proven) for this purpose only, it rests with you under your oaths and judgments, considering all the facts and circumstances in the case disclosed by the evidence, to say what would be a fair, reasonable, and just compensation to the plaintiff for her services, but in no event can you allow the plaintiff a greater sum than the value of the specific property which plaintiff claims was to be conveyed or devised to her therefor.'

But the court overruled the exceptions of said defend-

ants to said instructions so excepted to, and gave said instructions to the jury in the connection and as set out in the charge in chief, and to the giving of said instructions so excepted to, and to the refusal to give the said instructions so prayed for by the defendants, the said defendants at the time excepted, and this his bill of exceptions is now here signed and sealed by the court and made part of the record."

It will be observed that the bill of exceptions is quite meagre, almost nude in fact, in several essential particulars. It presents nothing at all of the evidence upon which this curious case was tried, except some few items referred to in the charge to the jury made by the judge who tried the case. That effort left the jury little, very little to do; and when one calmly looks at this record, and reads the discourse of the court, he can only wonder the jury did not give Martha all the plantations of Elisha, *Eminence*, *Sunny Side*, *Red Leaf*, and *So So*, and all that all the families of all the Worthingtons had besides.

While it is true — in fact, legally axiomatic — that this court will not review the evidence to see if upon that the verdict is right, yet it must have the evidence before it to see if the law given to the jury has anything in it to rest upon. It is a rule of this court that the evidence should appear, in order to test the relevancy of the instructions given or charge made by the court. (11 Wall., 193; 5 Wall., 318; 15 How., 323.)

The court will see at once the difficulty here. In all appellate courts strong presumption is indulged that the judgment of the court below is correct. To forecast and make sure of this presumption, to save this judgment, we have no evidence from the court below, only such parcels as the court here and there selected to predicate its address to the jury upon; and even in those references no suggestion is made that they are the only testimony in the case on those points. The bill of exceptions, in fact, outside of

the seven instructions asked for by defendants below, consists entirely of the oration delivered to the jury by the presiding judge. Yet this bill of exceptions is signed, sealed, and made of record by the court, notwithstanding the elementary rule that requires a bill of exceptions to exclude positively and absolutely the idea that anything else material to the cause occurred in the trial than is there recorded.

Under this state of case, it is not asking the court too much to request it not to strain the presumption that all is well in the court below,—not, at least, to perplex its mind to find a place under this presumption upon which to affirm the judgment below,—but to test the questions reserved on the instructions asked by defendants below, as well as those made on certain statements contained in the lecture of the judge to the jury, as matters of law in themselves; and if every one of the rulings below cannot stand the trial, the judgment should be reversed. This might not be so if this court had before it all the evidence in the trial, as some of these rulings might be found to be irrelevant, merely theoretical, and in no way affecting the case. But this cannot, in the condition of this record, be divined, and it is not for this court, in the absence of the facts of the case, to say what effect this or that ruling might have had on the jury. Indeed, it is a general rule of practice that appellate courts do not venture to determine this. (*Jordan* v. *Foster*, 11 Ark., 144; 3 *Graham & Waterman on New Trials*, 763, 774, 792, 795, 824, *et seq.*, and authorities *supra*.) And how much stronger is this rule in a case like this, where the judge trying it goes at the jury in all the handsome diction and splendid rhetoric of one who harangues the "fierce democracy" almost to desperation, and comes upon them with such complimentary terms as "*such an intelligent jury as I am now addressing.*" Words of such soothing import, whispered in Paradise, are said to have brought sin into the world and to have been the cause of all our woes. The

truth is, it would have required a most extraordinary jury to have stood the shock. It swept everything before it so completely that the counsel of Martha were overwhelmed into silence, asking no prayer of law for her, but submissively yielded her to the mercy of the court. And if this court even now, after a long lapse of time from the trial and at this distance from its scene, can breathe freely and look at the questions as those of law in the face of this display, it will be entitled to new credit.

The record then shows only questions of law, and to present them, these errors are assigned:

The court below refused to give any of seven instructions asked for by plaintiffs in error. (Transcript, pp. 9, 10.) These instructions will be noted more at length separately in this brief.

And the court below erred in instructing as to the effect of Elisha Worthington's taking Martha to Ohio, a free State, to school, upon the relation of master and slave existing between them. (Transcript, p. 14.)

And the court below erred in instructing the jury that they could consider the alleged special agreement for services for any purpose. (Transcript, pp. 14, 15.)

These exceptions are specifically named in the record, and they are now reiterated for error in the proceedings below.

The first instruction asked for by Worthingtons (Transcript, p. 9) requests the court to find, as law, that Martha Mason, while a slave, could not enter into a contract for her own benefit; and under the law of slavery, and by such law is this instruction to be tried, this proposition is a mere truism. (1 *Black. Comm.*, 424; 1 *Domat's Civil Law*, p. 143, art. 1, sec. 97; 4 *Dessau.*, 266, 267; *Wheeler's Law of Slavery*, 190, *et seq.*, and notes; *Hall* v. *United States*, 92 U. S., (2 Otto,) 27, and cases cited.) The truth is, this case from 2 *Otto* almost destroys the case of the plaintiff below from its very inception. This court, in the case from 2 *Otto*, very

properly "imagined itself in the presence of the circumstances by which the parties were surrounded when and where the contract was said to have been made," and tried the case in the light of those times; but here the court below ignored those times, and saw the case entirely in and by the light of these later and present days.

The contract for services beginning then in 1860, when Martha was a slave, "*it is as if it were not*"; (92 U. S., *supra*;) and it follows, of course, no after-emancipation, in any way or by any means, could revive it; and this is the substance of the second instruction asked for by the Worthingtons (Transcript, pp. 9, 10) but refused by the court. Besides this being the natural deduction from the first instruction, express adjudications sustain it to the letter. (*Jackson* v. *Bob*, 18 Ark., 399, and cases cited; *Gould's Dig.*, (Ark.,) p. 483, title *Emancipation.*)

The third instruction asked for by Worthingtons and refused by the court, (Transcript, p. 10,) repeats the second as to heirship by after-manumission. This is established by the authorities cited already: 10 *How.*, (*U. S.*,) 82; 19 *Id.*, 452; *Gould's Dig.*, (Ark.,) 441. Under the fourth section of this act, (Gould's Dig.,) in cases of free-born whites, an after-marriage and recognition are required.

The fourth, sixth, and seventh instructions, as to apprentices, the contracts of illegitimate children, marriage of whites and blacks, (Transcript, p. 10,) are all supported by the authorities already cited. (See *Reeve on Dom. Relations*, 2d ed., p. 324, *et seq.*)

The fifth instruction asked for by Worthingtons (Transcript, p. 10) required the plaintiff to prove that if W. had agreed to do certain things, she should prove he had failed to perform them, before she could recover. This contains an elementary principle of law, and the record discloses nowhere any reason why the court below declined to give it. 1 *Greenl. Ev.*, sec. 66, under title "SUBSTANCE OF THE ISSUE," says: "The gravamen is, that a certain act which the de-

fendant engaged to do has not been done." But the court below relieved plaintiff of this gravamen and dispensed with any effort from her as to this.

Even in the other rulings below, a more glaring error was not committed.

This presents the case as upon the law asked for by defendants below. Each of these instructions not only has the law, but, indeed, contains it *verbatim* almost. It might reasonably have been expected that some of them would have been given, or, if not, the court below would in another shape give their substance, which, under the practice, could have been done. But, curiously enough, the court not only refused them,—not only did not give others in substance the same, but discoursed the jury in terms, language, law, and all entirely different from and antagonistic to them. Not only did the court commit the negative error of refusing the law, but, trying the case in the light of later days entirely, fell into an affirmative error of giving a charge to the jury which is not law as applicable to the case.

In that part of the charge of the court below (Transcript, p. 14) which holds that by the taking of Martha to Ohio by Worthington to school she became free, and could no more become the slave of W., the court was terribly wide of the mark. The authorities already show this. This ruling was never law in the United States or elsewhere.

Moore v. *People*, *&c.*, 14 How., 13, is in the teeth of this holding. So is *Prigg* v. *Commonwealth*, 13 Pet., 539. So is *Strader* v. *Graham*, 10 How., 82. So is *Sandford* v. *Scott*, 19 How., 393. And cases without number, State and national, can be cited against such doctrine. The agony that some felt, that because a slave went into a free country he was not thereby free, is long since over, and the expiring efforts to carry the idea even beyond that were painful indeed, as witnessed in *Osborn* v. *Nicholson*, 13 Wall., 654, referred to by this court in 92 *U. S.*, *supra*.

Internationally it was not the law—(*Savigny's Priv. Int. Law*, p. 41, note A; *Westlake*, sec. 50; *Bar*, sec. 33; *Slave Grace*, 2 Hagg, 94, 134): this by Lord *Stowell* in 1827, and in 1828 Judge *Story*, in a letter to him, approved the decision, and said it was "impregnable." (1 *Story's Life and Letters*, (by William Story,) 557, 558; see also 1 *Sharswood's Black. Comm.*, pp. 423–425, and notes; 2 *Kent's Comm.*, 7th ed., 260, *et seq.*, and notes; *Wildman's Int Law*, p. 9, *et seq.*) These authorities do not indorse the stump speech of Lord Mansfield in *Somersett's* case, about *the shackles falling from the limbs of a slave,—the atmosphere of England being too pure*, and all that, made fifty-odd years before the case of the slave *Grace* was decided, and before Judge *Story's* letter to Lord *Stowell*.

But it was never contended that absence on a visit, for pleasure or business, emancipated a slave. (*Savigny, supra*, 41, 42.)

Martha's condition followed that of her mother; (11 *How.*, 375; 8 *Peters*, 220;) her mother was a slave and lived in Arkansas, which was her domicile. Under no state of case would Martha's absence as a student change her domicile. (*Savigny, supra*, 55, note 1, and note 6, p. 58.) The law of the domicile, so to speak, even leaving the master out of the case, controls. (*Savigny, supra*, 108 and note 2; 10 *How., supra.*)

Martha was a slave when she went to school in Ohio, and the declarations of Mrs. Bardwell, emphasized so by the court below, (*Trans.*, p. 12,) as to what Worthington said he wished done for and by her, could not serve to emancipate her. There was but one way, as we have seen, under the law of Arkansas, to do that, and that was not followed. Giving a slave a complete and thorough education, embracing even *music and drawing*—and we might add, if you please, dancing and boat-rowing—did not free the slave under the Arkansas law; and that law of emancipation had to be pursued. (92 *U. S., supra.*) Then she

came back to Worthington as she left him—Worthington's slave—and so remained till freed by operation of the war between the States. And she was a slave when she contracted; but she could not contract while a slave, (92 *U. S., supra,*) and that ends the case against her.

Enough has been said to justify a reversal of this case, and more is not needed; but another error is assigned which deserves some notice, in order that at the next trial the jury may have the whole law of the case correctly given to them.

In the charge to the jury the court below ruled out the special contract declared on by the plaintiff, as being within the statute of frauds. (*Trans.*, p. 11.) But afterwards it was allowed to go to the jury "as throwing light on the transactions between the parties," and "as tending to show the value the parties themselves placed upon the services of the plaintiff." (*Trans.*, pp. 14, 15.)

The two rulings of the court are utterly inconsistent. If the contract referred to was void under the statute of frauds, so that no recovery could be had upon it, how can it be made the basis of an estimate for the services of plaintiff? The action is one for damages. Damages for what? For the services of plaintiff, rendered and not paid for. How are these damages to be estimated? The court answers, by a special contract of the parties showing the value the parties themselves placed on these services. But this value is by a contract void under the statute of frauds—a contract upon which no recovery can be had. This is the plain and simple statement of the matter as it stands in this record. In other words, the damages make the whole subject-matter of inquiry. The contract upon which the damages are supposed to rest, is rejected; yet you can consider the contract in estimating the damages. In any light it is viewed, this recovery is one upon the special contract rejected or ruled out. There are probably cases in which the contract has been rejected as a basis of recovery, but admitted

afterwards to show some collateral fact,—such, possibly, as the identity or whereabouts of a party, or that a party was alive at such a time, &c.; but that it can be, after being adjudged void under the statute of frauds, admitted as affecting the merits of the case in any respect, there can surely be no adjudication. The damages claimed in this case were $100,000. If there had been no defense, and a judgment by default, the plaintiff would have been entitled to nominal damages, unless she had proved some certain amount. The margin from nominal to $100,000 damages is large and wide. To supply as far as may be this margin, this special contract ruled invalid is permitted to come in. This is reviving and enforcing the contract after declaring it invalid and worthless. The effect of the statute is to bar the remedy on this contract! What is the remedy? A recovery in damages; and these damages are to be ascertained and determined by the value the parties themselves set on the services named, in a special contract on which there is no remedy in law! A more positive and unqualified contradiction cannot be found in legal proceedings, it is safe to assert. To say you shall have no remedy on a contract, and then say your recovery—which is your remedy at last—can be estimated by that contract, is too much for even the uncertainty of the law to tolerate. It is not sustained by the books. (1 *Greenl. Ev.*, 262–274; 3 *Parsons on Contracts*, 1–14, 18, *et seq.*) So utterly worthless is the contract under the statute of frauds, that it has been rejected, for all substantial purposes, in States or countries where it would not be if made and entered into there. (1 *Rob. Pr.*, 319, 320; 14 *Eng. Law and Eq.*, 247; 12 *Com. Bench*, 801.)

The *light* this rejected special contract threw on the transactions between the parties, is the *light* by which the damages in this case were recovered—by which the remedy was enforced and made effectual. It was the main point involved, and not a mere collateral or side issue, and the jury were not merely influenced by it, but indeed controlled

by it. Even in its parting words to the jury, (Transcript, p. 15,) the court below referred expressly to the value of the specific property named in this contract between the parties, which, however, was held worthless under the statute of frauds.

In *Little* v. *Martin*, 3 Wend,, 219, the contract of lease was invalid under the statute of frauds, but it was admitted in evidence to show that the defendant entered into possession of the premises under it, but not to estimate damages by. Such, too, was the ruling in *Whitney* v. *Cochran*, 1 Scam., (Ill.,) 209.

In *King* v. *Brown*, 2 Hill, (N. Y.,) 485, the contract was void under the statute of frauds, but the plaintiff was permitted to prove services, as was done here, and recover the value thereof; but he was not allowed to resort to evidence of the value of the land about which the services were performed, as that would really be enforcing a contract already held invalid. (See also *Ellet* v. *Paxson*, 2 W. & S., (Penn.,) 418.)

In *Erben* v. *Lorillard*, 19 N. Y., 299, the court say: "When the agreement fixing the compensation is void, it furnishes no evidence of value. The parties are presumed to know the law, and to understand that such compensation cannot be recovered. Their position is the same, in a legal view, as though no agreement as to the amount of compensation had been made in fact, as there had been none in law. Were it otherwise, *and had the plaintiff the right to prove the value of the land as being the value of the services according to the understanding of the parties*," (what was done here,) "such value would constitute the rule of damages, and thus the plaintiff would receive the full benefit of the bargain. At all events, if the evidence is proper, the jury *may* adopt that as the value of the services, and thus effect the same

result. Under such a rule the statute would afford but little protection to the defendant."

Just so here: the statute insisted upon by defendants below, and enforced by the court, is afterwards overridden, and the same result reached as if it had not been relied on at all.

This case, (19 N. Y., *supra*,) which reviews at some length other cases on this point in that State, (*King* v. *Brown*, *supra*, among them,) is wholly adverse to the ruling of the court here excepted to; and it is valuable, too, in showing how careful the courts should be to regard error when even it *might have* affected the verdict.

Appellate courts hold steadfastly that a party is entitled to have the jury pass upon the facts, with a correct understanding of the law; and when this is not done, and the jury, if correctly instructed, *might have* rendered a different verdict, a new trial will be granted.

Then, another jury is bound, under other instructions, charges, speeches, addresses, orations, discourses, lectures, or what not, to pass on this case.

A. H. GARLAND,
For Plaintiffs.

—IN THE—

Supreme Court of the United States,

No. 121 OCTOBER TERM, 1879.

EDWARD T. WORTHINGTON AND ISAAC M. WORTHINGTON, AS ADMINISTRATORS OF ELISHA WORTHINGTON, Deceased, Plaintiffs in Error,

versus

MARTHA W. MASON,

In Error to the Circuit Court of the United States, for the Eastern District of Arkansas.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

ALBERT N. SUTTON,
of Counsel.

W. V. DERMITT, PRINTER, PITTSBURGH.

—IN THE—

Supreme Court of the United States,

No. 121 OCTOBER TERM, 1879.

EDWARD T. WORTHINGTON AND ISAAC M. WORTHINGTON, AS ADMINISTRATORS OF ELISHA WORTHINGTON DECEASED, PLAINTIFFS IN ERROR.

versus

MARTHA W. MASON.

In Error to the Circuit Court of the United States, for the Eastern District of Arkansas.

STATEMENT OF THE CASE.

Martha W. Mason, the defendant in error, brought her action by petition in the Circuit Court of the United States, for the Eastern District of Arkansas, against the defendants, now plaintiffs in error, as administrators of the estate of Elisha Worthington, deceased, to recover compensation:—

For services rendered to the decedent, commencing on the 6th day of December, 1860, and extending continuously to the 19th day of November, 1873.

And in support of her claim alleged a promise upon the part of the decedent, that in consideration of her remaining with him and rendering the services, he would at his death compensate her by

conveying or devising to her certain real estate which he then possessed.

Defendants by their answer plead several matters of defence, which briefly stated are:—

First. That plaintiff was the slave of the decedent, and not entitled to compensation.

Second. A denial of the promise or contract alleged by the plaintiff.

Third. Payment.

Fourth. Decedent's discharge in bankruptcy during the term of service.

The case was called for trial, on the issues thus presented, on the 8th day of May, 1876, and proceeded with until the 11th of May, when, after the testimony had been concluded, the defendants amended their pleadings by inserting: "But if any such agreement was made it was void under the statute of frauds, unless in writing." This amendment does not, from the record, appear to have been founded upon any exception or objection to the testimony adduced upon the part of the plaintiff, or to have been followed by any reference to the testimony in the cause, either by exception, motion or instruction; and so far as the record of the cause shows, there was no testimony before the Court to which this amendment was applicable, or attempt upon the part of the plaintiff to recover in any issue presented thereby. And we therefore submit that so far as this amendment is concerned, and the legal effect thereof, there is nothing presented by the record for the consideration of this Court.

In respect to the issues before the Court, viz: The demand on the part of the plaintiff to recover compensation for her services, denied by the defendant, 1st. By reason of her civil status; 2nd. No promise to pay; 3rd. That she was already fully paid; 4th. That decedent was only liable subsequent to his discharge in bankruptcy. The questions of fact were fairly and fully submitted to the jury, and the law, as we think, correctly stated by the Court.

The errors assigned in this record are to the action of the Court in refusing to give the instructions submitted by the defendants (pages 9 and 10 of record), and to the portion of the general charge set forth in their exception thereto (pages 14 and 15 of record) and present two questions.

1st. As to the civil status of Martha W. Mason upon her return to Arkansas in December, 1860.

2nd. As to what evidence the jury were to take into consideration in determining what would be a fair and reasonable compensation for the services rendered by Martha W. Mason to Colonel Worthington.

The first question is a mixed one of law and fact, and its investigation involves to a certain extent an examination into the facts of the case.

It is conceded as to the relation of the parties, *"That the mother of the plaintiff was a slave, and the property of Colonel Worthington at the date of plaintiff's birth, and that the plaintiff is the natural daughter of Colonel Worthington," that at plaintiff's birth she was the slave of her natural father. It is contended on the part of the plaintiff below that the relation of master and slave ceased on the 24th day of July, 1856,† when Col. Worthington voluntarily took her to Oberlin, Ohio, for the purpose of making it her place of residence. The evidence on this point is found in the uncontradicted testimony of Cornelia C. Bardwell, of Oberlin, Ohio, recited in the charge of the Court page 12 of record.

"On the 24th day of July, 1858, (1856,) Colonel Worthington "brought the plaintiff to her house in Oberlin, and said he intended "to give plaintiff a complete and thorough education, embracing "music and drawing, and that he would pay all her expenses; and "that plaintiff remained at Oberlin until about the beginning of the

*Charge of Court, Record p. 12.

†The date, 1858, mentioned by the Court was a mistake in date, plaintiff was taken to Ohio in 1856.

"war," * * * "She was not engaged in any employment or "service for Colonel Worthington; on the contrary, he directed "that she should not be required to take care of her own room, but "she should have all the privileges and advantages of a lady, and "directed that she should have all the literary and social advan- "tages that the place afforded."

This testimony was submitted to the jury and the facts found to be as stated by Mrs. Bardwell (see page 12 of record), upon the facts so found the Court stated the law.

The seeming conflict of rulings in the various States on the subject of slavery is rather a difference arising out of the particular facts in each case than in the principles of law applied, and the true test in such cases is stated in the case of Collins *vs.* America, 8 B. Monroe, 575, "If A, was sent to Ohio as her home, or with the privilege, by consent of her master, of living there, or making it her home, or for the purpose of being free, or under any circumstance which should in reason and justice, identify her with the institutions of Ohio, she became free by operation of the fundamental law of that State, as soon as she entered its territory and her subsequent return would not subject her to slavery."

And is sustained by—

Rankin *vs.* Lydia, 2 A. K. Marshall, 467.
Mercer *vs.* Gilman, 11 B. Monroe, 210.
Anderson *vs.* Crawford, 15 B. Mon. 272.
David *vs.* Porter, 4 Har. & McH., 418.
Bland et al. *vs.* Dowling, 9 Gill, J., 19.
Winny *vs.* Whitesides, 1 Mo., 472.
Willy *vs.* Smith, 2 Mo., 36.
Julia *vs.* McKinney, 3 Mo., 270.
Ralph *vs.* Duncan, 3 Mo., 194.
Anderson *vs.* Pointdexter, 6 Ohio St., 622.

There can be no controversy as to the fundamental law of Ohio on the subject of slavery.

Article VI, of the Ordinance of July 13, 1787, provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted."

This provision with but slight change of verbiage has been preserved in every constitution adopted by the people of that State. And its intent and purpose given judicial construction in the case of Pointdexter *vs.* Anderson, 6 Ohio St., 622.

Conceding for the sake of argument that under the circumstances the law might countenance the unnatural relationship of a father holding his child in slavery; the facts as shown by the testimony and found by the jury, show that the plaintiff below became by the consent and permission of her then master, a resident of the State of Ohio, that she remained there for more than four years amenable to and protected by the laws of that State, and identified with its institutions. By so doing the laws of Ohio fixed her civil status as that of a free woman, and when once free, her voluntary return to Arkansas would not return her to slavery.

The error assigned to the second question is founded exclusively upon an exception to a portion of the charge, to-wit:

"To return to the services, what the character of these services were, and what would be a reasonable and just compensation therefor under all the circumstances detailed in the evidence, it rests with you to determine from all the evidence in the case. And in considering the question of what would be a reasonable and just compensation to the plaintiff for her services, you are at liberty to take into consideration any evidence tending to establish the special agreement heretofore referred to, and if you find such special agreement or contract was made; that is, that the intestate, for the purpose of inducing the plaintiff to remain with him and render the services alleged to have been rendered, agreed to convey or devise to the plaintiff in payment for such services specified portions or parcels of his estate, and that the plaintiff did remain with the intestate and perform the required services until the death of the intestate, then,

as throwing light on the transaction between the parties, and as tending to show the value the parties themselves placed upon the services of the plaintiff, you are at liberty to take into consideration the value as disclosed by the evidence of such specific parcels of real estate which you may find the intestate agreed to convey or devise to plaintiff for such services, and *considering the specific contract* (if you find it proven) *for this purpose only*, it rests with you, under your oaths and judgments, considering all the facts and circumstances in the case disclosed by the evidence, *to say what would be a fair, reasonable and just compensation to the plaintiff for her services.* But in no event can you allow the plaintiff a greater sum than the value of the specific property which the plaintiff claims was to be conveyed or devised to her therefor."

In considering this exception the first question presented is one of practice.

Has the plaintiff in error by this exception presented a sufficient record to enable this Court to revise the ruling of the lower Court?

We think not.

"When a party is dissatisfied with the decision of his cause in an inferior Court and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the question of law to be revised, *and put the facts on the record* for the information of the appellate tribunal; * * * * * Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a Court of error exercising jurisdiction according to the course of the common law, * * The evidence whether written or oral * * * does not become a part of the record, unless made so by some regular proceeding at the time of the trial, * * and it is only when evidence is made a part of the record that the question of law arising upon it becomes a proper subject of revision on the writ of error."

Suydam *vs.* Williamson, et al., 20 Howard, 436.

Tested by these rules of practice does the exception present a cause of complaint upon the part of the plaintiffs in error, and have they preserved a remedy, for unless they have taken the proper steps at the trial of the cause in the lower Court, they must be content to abide the consequences of their own neglect.

Suydam *vs.* Williamson et al., ante.

The record shows no exception or objection by the plaintiffs in error to the competency or admissibility of any of the evidence upon the part of the plaintiff below, none is presented for the consideration of this Court, and so far as appears by the record "non constat" that there was any evidence before the jury for their consideration "in reference to any special agreement or specific contract, or as to the value of any specific parcel of real estate," so that under the rule as laid down in Suydam *vs.* Williamson, the plaintiff in error not *having put the fact on the record for the information of the appellate tribunal*, the question of law arising upon it cannot become a proper subject of revision on this writ of error.

We submit further, the record presents no cause of complaint upon the part of the plaintiff in error. It nowhere shows the admission of any evidence upon the facts referred to in the exception, then how does the plaintiff in error expect this Court to obtain information of the facts upon which they wish to base an argument to sustain their exception—they are not to be found in the record—and in order to hear the plaintiff in error, this Court must necessarily, 1st. Presume that evidence was admitted upon these facts, and 2d. That this evidence was offered by the defendant in error. From the language of the Court an inference may be drawn that evidence upon the facts alluded to had been received, but this does not help the cause of the plaintiff in error. On the contrary the record positively establishes the fact if such evidence was received, it was either at the instance of the defendants below or with their consent and approval, as no exception or objection to evidence is shown by the record. And if we are to determine this cause upon inferences and presumptions, and not from the record itself, we submit that

the legitimate presumption from the premises shown by the record, and exception is that the evidence was offered upon the part of the now plaintiffs in error, first, from the fact that the record shows no objection to its admissibility upon the part of the plaintiff in error; and second, the limitation fixed by it upon the possible recovery of the defendant in error. But either upon this or any other presumption, as this question must necessarily be argued upon the presumption that such evidence was in the case, we think there was no error in the charge of the Court.

The plaintiff below in support of her claim, alleged a contract upon the part of the decedent, the answer put this contract in issue. In the trial of the cause the Court and jury were entitled to look at the subject matter, the surrounding circumstances, and avail themselves of the same light which the parties enjoyed when they executed the contract, in fact so far as possible to place themselves in the same situation as the parties who made the contract, in order that they might view the circumstances as the parties viewed them.

Nash *vs.* Towne, 5 Wallace, 689.

After the conclusion of the testimony in the Court below, the defendants amended their answer by pleading the statute of frauds, this amendment was not followed by motion to strike out or request for the Court to withdraw from the consideration of the jury any of the testimony, and we think none could have been entertained.

The effect of the statute of frauds is to prevent recovery upon certain contracts, but does not make them illegal.

Abbott *vs.* Draper, 4 Denis, 53.

The contract could be shown for many purposes.

Davenport *vs.* Mason, 15 Mass., 94.

Stone *vs.* Dennison, 13 Pickering, 1.

Larkin *vs.* Avery, 23 Conn. R., 309.

Richardson *vs.* Gifford, 28 E. C. L., 35.

Basford *vs.* Pearson, 9 Allen, 391.

In Basford *vs.* Pearson, Chapman J., commenting on the case of Gray *vs.* Hill, Ry. & Mod., 420, say: "By admitting the evidence

of the promise * * * not for the purpose of enforcing it, but for the purpose of showing that the consideration to be paid had failed and applying to the case the equitable doctrine of an implied promise, the learned judge gave the statute of frauds its full legitimate force, and prevented it from operating as a protection to fraud."

In the present case no attempt was made to enforce the specific contract, but in the determination of the value of the services it was certainly competent to show not only the nature of the labor, the length of time, &c. We think it competent to show also all the surrounding circumstances including the value which the parties themselves placed upon them; in this view of the case we are sustained by Ham *vs.* Goodrich, 37 N. H., 185, the Court say: "When such contracts are within the statute of frauds, the value of the land is not the necessary measure of damages, because to make it such would be to give conclusive effect, in one respect, to an agreement which the law declares void. But the actual loss sustained and expenses incurred, under all the circumstances of the case, *taking the agreement into consideration* furnish the measure of damages, which the jury if they see fit may make equal to the value of the land."

In the case of King *vs.* Browne, 2 Hill, 478, Nelson, Ch. J., commenting on the case of Burlingame *vs.* Burlingame, says: "It does not appear from the report in Burlingame *vs.* Burlingame whether proof was admitted of the value of the land agreed to be conveyed for the services. Having tried the cause I well remember that it was, *not, however as an independent measure of recovery, but as an item of evidence pertinent to the question as to the value of the services rendered* and for which the land was agreed to be given in compensation. The agreement in that case settled nothing, except that the plaintiff was to work for the defendant till he was 21 years of age, (some 3 years), in consideration of which the 30 acres was to be conveyed. Hence the materiality of the value of the premises, *as that afforded some evidence of the understanding of the defendant himself in respect to the worth of the services.*"

The case of Burlingame *vs.* Burlingame, in respect to the contract, seems identical with the one alleged upon the part of the defendant in error.

In McGucky *vs.* Bitter, 1 E. D. Smith, 618, Daly, J., says: "Although a parol agreement to work for the defendant for two years is void, yet the plaintiff may recover for work and labor performed during that time, and may put the contract in evidence *to show the understanding* between the parties as to the rate of compensation."

In Clark *vs.* Terry, 25 Conn., 395, Herman, J., "It is true that if the plaintiff can recover at all, it must be for a *quantum meruit* or so much as he deserves to have for the services performed."

"*But this is not to be measured by the value of such services alone, as if no contract had been made between the parties.*"

"Now in respect to the question whether wages have been earned which ought to be paid for, and if so, to what extent or amount, and when the payment ought to be made. It appears to us that all the circumstances under which they are claimed to have been earned, *including the contract under which the service was performed, although it may be one that cannot be enforced by any action directly upon it, may and ought to be considered.*"

And in Norris *vs.* Homen, 2 Hilton, 116, Brady, J., held, in the absence of any evidence as to the value of the services, the rate of compensation fixed by the agreement should be regarded as the measure of damages.

In conclusion we respectfully submit, that in examining this record to ascertain whether the jury has been misled by the instructions of the Court, the Court will take into consideration its whole scope and bearing, and that from beginning to end but one real question was presented to the jury and that to determine what compensation, if any, the plaintiff below was entitled to, and this to be determined from all the evidence which the parties had seen fit

to present for their consideration. The question was fairly submitted to the jury upon all the evidence without objection by either party, and we think it now too late for the parties to ask this Court to correct errors, if any, which should have been remedied in the Court below and to which no objection was raised in that Court.

ALBERT N. SUTTON,
of Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 121.

WORTHINGTONS, AS ADMINISTRATORS, PLIAINTIFFS IN ERROR,

vs.

MARTHA W. MASON, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

ALBERT PIKE,
LUTHER H. PIKE,
Of Counsel for Defendant in Error.

Judd & Detweiler, Printers.

to hear the evidence on the 8th,) that the defendants asked, and had leave, to amend their complaint, by inserting *somewhere in it* the words, "but if any such agreement was made, it was void under the Statute of Frauds, unless in writing."

Record, 3.

POINTS OF LAW.

I.

As it appears by the Record,) if any of the facts so appear,) that there was evidence of promises by Worthington, in 1868, when the plaintiff was unquestionably free, to pay her for the services rendered by her, the court here cannot permit the presumption that this evidence was not sufficient; and that the jury did not find for the plaintiff upon such proof of promises to compensate, made upon good and sufficient consideration. It is therefore wholly immaterial whether she was free before she returned to Arkansas from Ohio, or whether she rendered the services under a contract or upon promises made before 1868.

II.

As to the law of Ohio and its effect upon the woman's status, she being voluntarily brought by her master into that Staet, &c.

The defendant in error became a free woman upon her entering the State of Ohio, such being the law of that State, she having been voluntarily brought there by her master.

The law in force in the State of Ohio during the year 1858, in respect to the relation between master and slave, was thus expressed, "there shall be no slavery in this State,

nor involuntary servitude, except for the punishment of crime." (Constitution of Ohio, 1851, art. 1, sec. 6.)

The object of this law was absolutely to dissolve the relation, and terminate the rights of the master existing under the law of the country whence the master came, voluntarily bringing his slave with him.

Anderson *vs.* Poindexter, 6 Ohio State R., 622.

III.

The State of Ohio had the power to enact such law:

(*a.*) The foundation of slavery is force. It has none in the law of nature, or the unwritten common law.

Rankin *vs.* Lydia, 2 A. K. Marshall, 470.
1 Burge Col. and For. Laws, 738, 741.
Wharton Con. Laws, sec. 9, n. i.

(*b.*) The state of slavery is deemed to be a mere municipal regulation founded on and limited to the range of territorial laws.

Prigg *vs.* Pennsylvania, 10 Pet., 611.

(*c.*) Internationally there can be no property of man in man.

Wharton Con. Laws, sec. 9, n. i.

(*d.*) If a master goes voluntarily with his slave beyond the territorial limits within which, *i. e.*, beyond the State by whose municipal regulation slavery is sanctioned, the slave may thereupon assert his right to freedom in any manner not in violation of the land entered outside said territorial limits.

This, because the law of the State sanctioning slavery being destructive of capacity, has no extra-territorial force.

Wharton Con. Laws, sec. 101.

And if not restrained by the law of the land so entered, the slave may, in the assertion of his right to freedom, resist with force, even to the taking of life, any effort of the master to prevent his exercising and enjoying the full rights of freedom.

If there be no law of the land so entered to the contrary, the slave can voluntarily continue in servitude, and, voluntarily returning to the country whence he came with the the master, continue to be a slave there if it so wills.

This, because nothing was interposed to break the law of force.

Hence we may state as propositions of law, that if a master voluntarily carries his slave beyond the State that sanctions the relation, such relation may be dissolved—either:

(*a.*) By the voluntary act of the slave upon his natural right to freedom, and, no law there forbidding, of resisting force with force.

(*b.*) By positive declaration to that effect of the foreign State; that is to say: The foreign State is not only not bound to recognize the relation of master and slave existing under the municipal regulations of another State, but it has the undoubted right and power to provide for the immediate emancipation of the slave so voluntarily brought within its limits.

(*c.*) By law of the State from which the master took his slave, declaring, that a slave so taken from it, shall not, returning, voluntarily or otherwise, be permitted to be a slave.

As a general proposition of law, the second of these last propositions is most conclusively established.

As applicable to the United States, it must be stated in this qualified manner:

Each State of this Union had, in the years 1858, 1859, and 1860, the power and right to declare the immediate emancipation of a slave voluntarily brought by his master within its territorial limits, except as—

(*A.*) Its power and right in this respect was restrained by the Constitution of the United States; or—

(*B.*) Restrained by some duty or obligation imposed upon it by the principles of the law of comity, especially in force between the several States of the Union, and peculiarly applicable to these by their intimate relation under this Union.

A.

I. The perfect equality of the different States lies at the foundation of the Union, and each of them, prior to the year 1861, had the undoubted right to declare the immediate emancipation of a slave brought by his master voluntarily within its territorial limits, except as restrained by the Constitution of the United States.

City of New York *vs.* Milne, 11 Peters, 131.
Groves *vs.* Slaughter, 15 Peters, 419.
Prigg *vs.* Commonwealth, &c., 16 Peters, 594.
Rhodes *vs.* Bell, 2 Howard, 307.
Strader *vs.* Graham, 10 Howard, 82.
Moore *vs.* Illinois, 14 Howard, 13.
Lemmon *vs.* The People, 20 N. Y. (6 Smith), 603.
Rhodes v. Bell 2 How., 397.

II. Prior to the year 1861 no restraint upon this right was imposed by the Constitution of the United States.

Lemmon *vs.* The People, 20 N. Y., 603.

(*a.*) Not by article IV, section 2, subdivision 3—for that imposed a restraint only as to fugitive slaves.

Groves *vs.* Slaughter, 15 Peters, 508.
Prigg *vs.* Commonwealth, 16 Peters.
Strader *vs.* Graham, 10 Howard, 92.
Ex parte Simmons, 4 Washn. C. C. R., 396.
Lemmon *vs.* The People, 20 N. Y., 624.
Commonwealth *vs* Aves, 18 Pick., 221.
Butler *vs.* Hopper, 1. Washn. C. C. R., 499.
Field *vs.* Walker, 23 Ala., 155.

(*b.*) Not by article IV, section 2, subdivision 1—for that provision had but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens.

Lemmon *vs.* The People, 20 N. Y., 608.
Story on Constn., sec. 1806.
Tennessee *vs.* Ambrose, 1 Meigs, 331.
Scott *vs.* Sandford, 19 Howard, 422.

(*c.*) Not by article I, section 8, clause 3—for under the commercial power conferred by this provision there was no power conferred to interfere with slavery as it existed in the States.

Groves *vs.* Slaughter, 15 Peters, 499.
Lemmon *vs.* The People, 20 N. Y., 562.

(*d.*) Not by article V of the amendments—for to assert, that by virtue of that article, a slave-owner could voluntarily carry his slave as property, like his hat, into a State having a constitutional provision similar to that of Ohio, and there hold him in slavery even for a day, would be to assert, that the citizen of the foreign State could have a right, privilege, or immunity not permitted the citizen of the State itself.

The sole purpose had in view in the adoption of this provision "was to declare to the several States that, whatever those rights, as you grant or establish them, to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

Slaughter-House Cases, 16 Wall., 77.
Ward *vs.* Maryland, 12 Wall., 430.
Paul *vs.* Virginia, 8 Wall., 180.

B.

It was and is wholly within the discretion of each State to determine to what extent, if any, it will be restrained by the principles or rules of inter-state comity.

Comity cannot be demanded as a right.

A State can recognize it or not at its pleasure. Consequently, when a State manifests by its organic or statutory law its will to depart from a rule of international law, and its determination not to recognize a right or privilege claimed on the ground of comity, that is the final disposition of the matter, and the courts must give effect to its will.

Bank of Augusta *vs.* Earle, 13 Peters, 589.
Prigg *vs.* Pennsylvania, 16 Peters.
Lemmon *vs.* The People, 20 N. Y., 603.
Anderson *vs.* Poindexter, 6 Ohio.
Story Conflict of Laws, pp. 23, 398.
2 Kent Com., p. 457.

IV.

The court, in Anderson vs. *Poindexter, 6 Ohio, p. 622, rightly construed the constitution and laws of Ohio, in relation to the institution of slavery in that State.*

Article XIII, ch. 1, of the Constitution of the United States is in these words:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

These were apt words wherewith to express the determination that slavery should not exist, neither for a year, nor for a month, a week, or a day.

The will thereby expressed was absolutely to dissolve the relation between master and slave, and terminate the rights of a master existing under the law of the country whence the parties may come.

Lemmon *vs.* The People, 20 N. Y., 608.

Betty *vs.* Horton, 5 Leigh, 615.

United States *vs.* Rhodes, by Mr. Justice Swayne, Kentucky, Oct. Term, 1867.

In re Elizabeth Turner, Mr. Justice Chase, (Maryland, 1867,) 1 Abbott, U. S. R., 84.

Slaughter-House Cases, 16 Wall., 69.

The constitution of Ohio, 1851, Art. 1, Sec. 6, imported the same thing.

Manumission may be made by implication.

Cobb on Slavery, sec. 366.

Legrand *vs.* Darnell, 2 Peters, 664.

This where the acts of the owner are sufficiently expressive of the consent of the master, that the slave shall be free.

In the particular case there was a manumission of the defendant in error by implication.

(*a.*) By her being left in Ohio in the possession and enjoyment of unrestricted personal liberty, whereby dominion over her was voluntarily surrendered by her master.

Cobb on Slavery, sec. 111.
The State *vs.* Hill, 2 Speers, 150.
Hunter *vs.* Shaffer, Dudley, (Ga.,) 224.
Fox *vs.* Lambson, 2 Halstead, 275.
Lenan *vs.* Johnson, 2 Bailey, 37.

(*b.*) By the master's making provision for her maintenance and education, she being in possession of unrestricted personal liberty, and by his directing that she should not be required to perform menial service—that she should be treated as a lady.

This was to demand that her situation should be regarded, and she dealt with, as free.

(*c.*) The master's right to manumit his slave arises from his power as owner to renounce his right to her, and requires no permission or sanction of law to give it validity or effect. On the contrary, it requires the most explicit prohibition of law to restrain this right.

McCutchen *vs.* Marshall, 8 Peters, 238.

(*d.*) To presume that Worthington did not intend the manumission of the defendant in error would be to presume that he was intentionally violating at once the law of Ohio and the slave policy of Arkansas.

(1.) The law of Ohio, by secretly and evasively endeavoring to maintain there the relation of master to the defendant in error as a slave, in the face of open declaration that she should be received and dealt with as one free.

(2.) The slave policy of Arkansas, by educating a slave

in a manner and to a degree not countenanced by that policy.

This Court will not presume fraud, and will not declare that Worthington was intending to violate the law and policy of said States, except upon clear proof.

8 Peters, 244.

1 Black, 80.

Worthington assented to the emancipation of his slave by the State of Ohio by voluntarily carrying her into that State, with full knowledge that the will of that State, expressly declared, was that she should thereupon become free.

Volenti non fit injuria.

Lemmon *vs.* The People, 20 N. Y., 603.

It was never contended, in behalf of the rights of slaveholders, that a citizen of South Carolina could voluntarily take his slave into a Northern State and return home, leaving him or her there, to go and come, work or play at pleasure, to be educated during three or four years, and afterwards reclaim the person so dealt with as still a slave. We were not *entirely* insane. The claim of the South was that slaves of their citizens should not be deemed to become free while in their custody *in transitu* through a free State, or during a temporary residence of master and slave.

V.

The status of defendant in error under the law of Arkansas, upon her return there, in 1860.

(*A.*) In the years 1858, 1859, and 1860, the customary law of Arkansas was the common law.

Gould's Dig. Stats. of Ark., chap. 34, p. 254.

The common law, as Blackstone says, (4 Com., 67,) adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land.

Curtis J., Scott *vs.* Sandford, 19 How., 595.

The State of Arkansas was admitted into the Union with full knowledge of the expressed will of Ohio in regard to the institution of slavery within her territorial limits.

In the absence of positive proof to the contrary, it must be presumed that Arkansas assented to the will of Ohio prohibiting slavery within her limits; and pledged her good faith, and that of her people, to respect the laws of Ohio, in that regard, in their operation within that State.

It will not be presumed that Arkansas, in sanctioning slavery within her limits, intended, as a feature of her slave policy, to countenance and sustain any infraction of the law of Ohio done within her limits, by one of her citizens.

Prigg *vs.* Pennsylvania, 12 Peters, 657.

Such an intent must be clearly proven.

Hager *vs.* Thompson, 1 Black, 80.

Lemmon *vs.* The People, 20 N. Y., 603.

Manumission once effected by the operation of foreign laws, is as complete and effectual to secure liberty to the slave as manumission by deed, and the subsequent return of the negro to the domicile will not restore to the master dominion over him.

Cobb on Slavery, sec. 373.

Marie *vs.* Marot, 8 La., 475.

Ben. Mercer *vs.* Gilman, 11 B. Mon., 210.

Griffith *vs.* Fannie, Gilm, 143.

Louis *vs.* Cabarrus, 7 La., 170.

Foster *vs.* Foster, 10 Grattan, 492.

Minney *vs.* Whitesides, 1 Miss., 472.

Bland *vs.* Dowling, 9 G. & J., 19.
Josephine *vs.* Poultney, 1 La. An. R., 329.
Lydia *vs.* Rankin, 2 A. K. Marshall, 467.
Robert *vs.* Melungen, 9 Mo., 170.

In the absence of positive law to the contrary in Arkansas, it will be presumed that that State allowed effect to the law of Ohio, that conferred upon defendant in error the *status* of freedom.

For it is an established rule that when there are conflicting local laws (here none are shown) more or less favorable to capacity, that will be preferred by which the capacity in question is most enlarged.

Wharton's Confl. Laws, sec. 102.

And, giving effect to the law of Ohio, and recognizing defendant in error to be a free woman, secured to her the enjoyment of it.

Arkansas Constitution, art. 2, sec. 10.

As no reference is made in the particular case to any law of Arkansas, organic or statutory, or to any decision of any one of her courts, to show that the State of Arkansas had not, in 1858, 1859, or 1860, displaced the rules of international law—part of her law; this Court will not hold itself bound by the decisions of State courts.

Swift *vs.* Tyson, 16 Peters, 1.
Carpenter *vs.* Prov. Ins Co., 16 Peters, 495.
Foxcroft *vs.* Mallet, 4 How., 353.
Rowan *vs.* Runnels, 5 How., 134.

The law of Arkansas, in regard to the emancipation, (Gould's Digest, p. 483, Title Emancipation,) in no wise affected the *status* of freedom acquired by defendant in error under the laws of Ohio, and Worthington's manumission of her.

It had reference solely to acts of emancipation done within the State of Arkansas.

Smith *vs.* Smith, 13 La., 446.

Upon any point of view Worthington and his administrators were estopped from denying that defendant in error was free upon and after her being carried into Ohio.

VI.

In reference to the admissibility of testimony (whatever it was) as to the alleged special contract to convey land in payment of the services rendered.

The contract relied on was, as it is stated in the complaint, that in consideration of the services of the plaintiff, Worthington, at various times (1st cause, Record, 2) "promised that *at his death* he would leave her the two plantations" named, "which he had repeatedly promised to give her at his death," which promises "so often and so earnestly made to plaintiff" he never carried out, but died intestate.

Record, 3.

This agreement was not void under the Statute of Frauds, as one not to be performed within a year; for the evidence in regard to it not being made part of the record, it is impossible to say that, at the time of the last promise, whenever that was, it was certainly not to be performed within a year, or could not, in the nature of things, be performed within a year. It was to be performed by him at his death, by will.

There was, it appears by the charge, evidence before the jury tending to establish this agreement, and the jury could, from that evidence, find that it was made, without

being held so to have found on insufficient evidence, if oral evidence was admissible.

The court left it to the jury to decide whether Worthington did agree "to *convey* or *devise*" the lands. But the contract, as stated, was not "to convey or devise," but to devise only. If it *had* been in the alternative, it would have created no obligation to convey, because it would be satisfied by devising; so that even thus, it would have amounted to no more than an agreement to leave her the property at his death.

It was not "a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." No action could be brought to enforce it as such a contract. If it had been in writing, it would have created no right to or interest in the lands. No action can be maintained against heirs or executors, on a promise of testator or intestate to devise certain lands by will. The promise could not be more effectual than a will made in performance of it; and as the party could at any time revoke or cancel such a will, he could at least equally fail to keep the promise; and as, in this case, there was, therefore, in the promise no real consideration for the services, the plaintiff could recover their value, and could prove the contract by parol—not to enforce it as creating an interest in the land, not to have execution of it in any way to affect the land—but to show that the promised consideration was a delusion, and also to show at what he estimated the value of her services.

As the contract could not, if it had been in writing, have been used to establish a right to the land, or any manner of interest in it, it was not within the statute of frauds under that clause of it. It was an agreement for her services, and, virtually, that these should be paid for—in land, if he should by will give her the land—in money, if he failed to make the devise, which he could make or not, as he might choose.

(A.) The plaintiff could not prove this oral contract, or these oral promises, as an agreement giving her any right to or interest in the land; but being a laborer who had served the entire time, could recover upon a *quantum meruit* the reasonable and fair value of the services rendered; and testimony as to the specific contract was admissible, and the jury could consider it as throwing light on the transaction between the parties, and as tending to show, not as a contract, but as an admission, the value placed by the parties themselves upon the services, even if it *had* been within the statute.

Ham *vs.* Goodrich, 37 N. H., 185.
McGlucky *vs.* Bitter, 1 E. D. Smith, 618.
Nones *vs.* Homer, 2 Hinton, 116.
Sims *vs.* McEwen, 27 Ala., 184.
Ray *vs.* Young, 13 Texas, 550.
Van Valkenburgh *vs.* Croffert, 7 N. Y. Weekly Digest, 164, (1877.)
King *vs* Browne, 2 Hill, 487.
Basford *vs.* Pearson, 9 Allen, 391.
Gray *vs.* Hill, Ry. & Mod., 420.
Abbott *vs.* Draper, 4 Denio, 53.
Clark *vs.* Terry, 25 Cowen, 395.
Burlingame *vs.* Burlingame, 7 Cowen, 92.

VII.

As to the refusal of the court to give the seven instructions requested by the plaintiff in error:

This court will hardly revoke its repeated rulings, that it will not consider such an exception as is taken here, to the refusal of the court to give the instructions as a whole. Some of them were inapplicable to the facts, some erroneous in law, some in part well enough, and in part utterly untenable. The court did give them in part, by its charge;

and the defendants should have specified those, the failure to give which they claimed to be ground of exception.

It is the settled law in this court that, if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further. It may use its own language and present the case in its own way. If the results mentioned are reached, the mode and manner are immaterial. The court has then done all that it is bound to do, and may thus leave the case to the consideration of the jury. Neither party has the right to ask anything more.

Indianapolis, etc., *vs.* Horst, 93 U. S., 295.

It is not error to refuse to give instructions asked for, even if correct in point of law, provided those given cover the entire case and submit it properly to the jury.

Laber *vs.* Cooper, 7 Wall., 571.

Mills *vs.* Smith, 8 Wall., 32.

If one of a series of propositions presented to a court as one request for a charge to a jury is unsound, an exception to a refusal to charge the entire series cannot be maintained.

Beaver *vs.* Taylor, 93 U. S., 54.

Transportation Line *vs.* Hope, 95 U. S., 301.

When the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in appellate court; but in every such case the part of the charge to which the exception is addressed ought to be distinctly pointed out. Unless that be done the exception cannot be sustained as a ground for reversing the judgment, as that can only be done for error of law.

Railroad Co. *vs.* Varnell, 98 U. S., 485.

This Court has no right to order a new trial, because they may believe that the jury may have erred in their verdict on the facts.

Mills *vs.* Smith, 8 Wall., 32.

It is a novel complaint, that to save this judgment, we have no evidence from the court below, only such parcels as the court here and there selected; and that "even in those references no suggestion is made that they are the only testimony in the case on these points;" and this by the party whose business it was to bring the evidence here by ~~her~~ their bill of exceptions. We had no ground for exceptions, and without taking a bill of exceptions could not put the evidence into one.

If "the elementary rule" requires a bill of exceptions to exclude positively and absolutely the idea that anything else material to the cause occurred in the trial than is there recorded, let the learned counsel revile it as he will. He has the right to belittle the work of his client's counsel's own hands. It is not our bill; and the court below was not bound to perfect it for them.

The learned counsel of the plaintiff in error says that the Court here must have the evidence before it, to see if the law given to the jury has anything in it to rest upon. He should have said, "to see if the law given was, as he alleges, *in*-correct." The bill of exceptions is not ours. *We* have not failed to bring the evidence here. "It is a rule of this Court," he says, "that the evidence should appear"—and that means that *the plaintiffs in error* should have brought it here—"in order to test the relevancy of the instructions given, or charge made, by the Court."

When the learned counsel asks this court to reverse, if it finds a single ruling of the court below abstractly erroneous, and gravely adds that this might not be so if the court here had before it all the evidence in the trial, as some of these rulings might in that case be found to be irrelevant, merely

theoretical, and in no way affecting the case, he gives the case away. It was the business of the counsel of his clients to show the court here, by bringing here all the evidence, that the rulings complained of were *not* irrelevant, merely theoretical, and in no way affecting the case; and they having failed to do that, we have a right to insist that there *was* testimony which made those rulings utterly immaterial—ample testimony of the value of the services, and testimony of subsequent promises which made it immaterial whether there was such a contract as alleged prior to 1868.

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